CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 318

SAMPSON TULEE, APPELLANT

vs.

STATE OF WASHINGTON

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED JULY 28, 1941

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 318

SAMPSON TULEE, APPELLANT

vs.

STATE OF WASHINGTON

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

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1-2 In the Superior Court of the State of Washington

for Klickitat County

No. C. 672

THE STATE OF WASHINGTON, PLAINTIFF

vs.

SAMPSON TULEE, DEFENDANT

Information

Filed May 16, 1939

Comes now Edgar H. Canfield, Prosecuting Attorney of Klickitat County, State of Washington, and by this, his information, accuses Sampson Tulee, a Yakima Indian, of the crime of illegal taking and sale of commercial food fish committed as follows:

That on or about the 6th day of May 1939, and within the last 3 year * * * immediately preceding the filing of this information at Spearfish in Klickitat County, Washington, the above-named defendant, Sampson Tulee, then and there being, did then and there catch, with a dip bag net, certain food fish, to wit: Salmon, and did then and there sell the same commercially, without first having obtained a license for the taking thereof as required by Section 5703, Remington's Revised Statutes of Washington, contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Washington.

Dated at Goldendale, Washington, this 16th day of May 1939.

EDGAR H. CANFIELD,
Prosecuting Attorney.

STATE OF WASHINGTON,
County of Klickitat, ss.

Edgar H. Canfield being first duly sworn on oath, says:

That I am the duly elected, qualified, and acting Prosecuting Attorney of Klickitat County, Washington; that I have read the foregoing information, know the contents thereof, and believe the same to be true.

2½ EDGAR H. CANFIELD.

Subscribed and sworn to before me this 16th day of May 1939.

[SEAL] R. M. SPOON,
Clerk of said Superior Court.

[File endorsement omitted.]

3 In the Superior Court of Klickitat County

[Title omitted.]

Warrant of arrest on information

May 16, 1939

The State of Washington, to the Sheriff of said Klickitat County, Greeting:

Whereas, in the Superior Court for said County, held at Goldendale the Prosecuting Attorney for said Klickitat County, did present and file an information on the part of the State of Washington, charging the above-named Sampson Tulee with the crime of Illegal taking and sale of commercial food fish, in that the said Sampson Tulee, then and there being, did then and there catch, with a dip bag net, certain food fish, to wit: Salmon; and did then and there sell the same commercially, without first having obtained a license for the taking thereof as required by Section 5703, Rem. Rev. Stat.

Now, therefore, in the name of the State of Washington, you are commanded forthwith to apprehend and arrest the said Sampson Tulee and bring him before this Court to answer said charge, and abide such further order as the Court may make in the premises.

Witness, the Hon. J. E. Stone, Judge of the said Superior Court, and the seal of said Court hereto affixed this 16th day of May 1939.

[SEAL] R. M. SPOON,
Clerk of said Superior Court.

Bail fixed at $———.

Sheriff's return

STATE OF WASHINGTON,
County of Klickitat, ss.

I hereby certify, that by virtue of the within warrant
31½ I have arrested the said Sampson Tulee, a Yakima Indian, and that he is now in the custody of C. R. House, Sheriff of Klickitat County.

Dated this 17th day of May 1939.

C. R. HOUSE,
Sheriff of County aforesaid.
By EDWARD KARGE,
Deputy.

Filed May 25, 1939.
R. M. Spoon, County Clerk.

4 In the Superior Court of Klickitat County

[Title omitted.]

Amended information

April 16, 1940

Comes now Edgar H. Canfield, prosecuting attorney, Klickitat County, Washington, and by this, his Information, accuses Sampson Tulee, a member of the Yakima Indian Tribe, with the crime of Illegal Taking and Sale of Commercial Food Fish committed as follows:

That on or about the 6th day of May 1939, and within the last year immediately preceding the filing of this amended information, at Spearfish on the Columbia River in Klickitat County, Washington, the above-named Sampson Tulee, a member of the Yakima Indian Tribe, then and there being, did then and there catch, at one of the usual and accustomed ancient fishing places of said Yakima Tribe of Indians as defined in the Yakima Indian Treaty of June 9, 1855 (12 Stat. 951), and off the reservation of said Indians, certain food fish, to wit: salmon, and did then and there sell the same commercially without first having obtained a license for the taking thereof as required by section 5703, Remington's Revised Statutes of Washington.

Contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Washington.

Dated at Goldendale, Washington, this 16th day of April 1940.

5 EDGAR H. CANFIELD,
Prosecuting Attorney.

STATE OF WASHINGTON,
County of Klickitat, ss.

Edgar H. Canfield, being first duly sworn, on oath says: that he is the duly elected, qualified, and acting prosecuting attorney of Klickitat County, Washington; that he has read the foregoing amended information, knows the contents thereof, and believes the same to be true.

EDGAR H. CANFIELD.

Subscribed and sworn to before me this 16th day of April 1940.
[SEAL] R. M. SPOON,
County Clerk.

[File endorsement omitted.]

6 In the Superior Court of Klickitat County

[Title omitted.]

Demurrer to Amended Information

April 16, 1940

Comes now the defendant, Sampson Tulee, and demurs to the amended information upon the ground and for the reason that

(1) The facts charged do not constitute a crime; and

(2) The amended information contains matter which, if true, constitutes a legal bar to the action.

Dated this 16th day of April 1940.

SAM M. DRIVER,
LYLE KEITH,
KENNETH R. L. SIMMONS,
Attorneys for defendant Sampson Tulee.

Copy Received.
EDGAR H. CANFIELD,
Pros. Atty.

[File endorsement omitted.]

7 In Superior Court of Klickitat County

[Title omitted.]

Arraignment

April 16, 1940

This cause coming on regularly for hearing in open Court on this 16th day of April 1940 upon the arraignment of said defendant to plead to the information heretofore filed against him. And comes Edgar H. Canfield, Prosecuting Attorney of said County and State, and the said defendant, Sampson Tulee, is brought to the bar of the court here with him comes his attorney, Lyle Keith, Assistant United States Attorney for the Eastern District of Washington.

Whereupon the information being read to said defendant and it being then demanded of him, the said defendant, if the name by which he stands charged therein is his true name, he answers, "It is." It being further demanded of him whether he is guilty of the charge or charges specified in said information, said de-

fendant thereupon pleads not guilty to the charge or charges as set out in the information.

It is hereby ordered that the plea of said defendant to the information specified be, and the same is hereby accepted and ordered filed, and that said defendant be, and he is hereby remanded to the custody of the Sheriff of Klickitat County, Washington.

Done in open Court this 16th day of April 1940.

J. E. STONE, *Judge.*

[File endorsement omitted.]

8 In Superior Court of Klickitat County

[Title omitted.]

Order overruling demurrer

April 16, 1940

This matter coming on to be heard this day upon the demurrer of defendant to the amended information filed herein, plaintiff being represented by Edgar H. Canfield, prosecuting attorney, and defendant being present and represented by Lyle Keith, assistant United States Attorney for the Eastern District of Washington, and both counsel having waived argument on said demurrer, it is, therefor',

Ordered that said demurrer be and the same is hereby overruled.

Done in open court this 16th day of April 1940.

J. E. STONE, *Judge.*

[File endorsement omitted.]

9 In Superior Court of Klickitat County

[Title omitted.]

Plaintiff's requested instructions

Filed May 10, 1940

10 Instruction No. 1

Members of the Jury:

This is a criminal action in which the state of Washington is plaintiff and Sampson Tulee is defendant. The state, by the prosecuting attorney, has charged the defendant with the crime of Illegal Taking and Sale of Commercial Food Fish, alleged to have been committed as follows:

That on or about the 6th day of May 1939, and within the last year immediately preceding the filing of this amended information, at Spearfish on the Columbia River in Klickitat County, Washington, the above-named Sampson Tulee, a member of the Yakima Indian Tribe, then and there being, did then and there catch, at one of the usual and accustomed ancient fishing places of said Yakima Indian Tribe of Indians as defined in the Yakima Indian Treaty of June 9, 1855 (12 Stat. 951), and off the Reservation of said Indians, certain food fish, to wit: salmon, and did then and there sell the same commercially without first having obtained a license for the taking thereof as required by Section 5703, Remington's Revised Statutes of Washington.

Instruction No. 2

To this information the defendant has interposed a plea of not guilty, thus raising every issue in this case and making it necessary for the State to prove to your satisfaction beyond a reasonable doubt every material element of the crime with which the accused stands charged.

Instruction No. 3

You are instructed that the laws of the state of Washington provide that every person, firm, or corporation using a dip bag net for the taking of salmon in the Columbia River shall pay therefor a license of $5.00 per year.

11

Instruction No. 4

You are instructed that the State of Washington has the right to regulate the taking of fish within its boundaries and in streams not included in or bordering upon the Yakima Indian Reservation. You are further instructed that this right of regulation includes the right of fixing licenses and providing for penalties in the event of noncompliance with whatever regulations are enacted. You are further instructed that the defendant Sampson Tulee is subject to these regulations so long as he is fishing on streams not included in or bordering upon the Yakima Indian Reservation, and that the fact of his being a member of the Yakima Tribe of Indians must not be considered so far as these instructions are concerned.

Instruction No. 5

A person accused of crime is presumed to be innocent. This presumption is not a matter of form merely which the jury may

disregard at pleasure, but continues throughout the trial until the same shall have been removed or overcome by proof of guilt beyond a reasonable doubt.

Instruction No. 6

These instructions are given by the Court as a whole and are so to be considered by the jury. Each and every instruction is to be considered in connection with all of the other instructions given.

Instruction No. 7

If you find that the State has proved to you beyond reasonable doubt all the elements of instruction No. 1, you will find the defendant guilty of illegal taking of food fish; to wit: salmon; on the other hand, if you find that the State has failed to prove all the elements beyond reasonable doubt, you will find the defendant not guilty.

12 Instruction No. 8

In conclusion let me remind you that each of you have taken a solemn oath that you will well and truly try this case and a true verdict render upon the evidence given on the trial and upon the law as now given you by the Court.

You have nothing whatever to do with the punishment to be inflicted in case of a violation of the law. The fact that punishment may follow a conviction cannot be considered by you, except insofar and only so far as it may tend to make you careful.

Neither must you allow yourself to be moved in the least by sympathy or influenced by prejudice. The question of guilt or innocence is a question of fact, not a question of prejudice or of what the punishment shall be. If, as a matter of fact, from the evidence, the defendant is guilty, no amount of sympathy will make him innocent. If he is innocent, no amount of prejudice will make him guilty. For, regardless of what the penalty may be, regardless of any feeling of sympathy or prejudice, the defendant is upon the evidence and the evidence alone, either guilty or not guilty. What is the true verdict as shown by the evidence is the one question before you.

Instruction No. 9

The jury is further instructed that the doubt which entitles the defendant to an acquittal must be a doubt for which a reason exists. You are not to go beyond the evidence to hunt up doubts,

nor must you entertain such doubts as are merely vague, imaginary, or conjectural. A reasonable doubt is such a doubt as exists in the mind of a reasonable man after he has fully, fairly, and carefully compared and considered all of the evidence or lack of evidence introduced on the trial. If, after a careful consideration and comparison of all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

13 Instruction No. 10

You are the sole judges of the evidence in this case, of the credibility of the witnesses and of the weight to be accorded to the evidence received.

In considering the credibility of any witness and the weight to be given to his testimony, you should take into consideration his appearance and demeanor upon the stand, his manner of testifying, his apparent candor and frankness or bias, if either be shown, his means of knowledge or observation of the matters concerning which he has testified, the probability or improbability of the story which he relates, and his interest, if any, in the event of this action.

Instruction No. 11

If it has appeared to you that the Court, during the trial or in the giving of these instruction', has commented on the evidence, or indicated in any manner its opinion of the weight or convincing effect of any of the testimony, you shall disregard such comment entirely, for it is the jury and not the Court which must decide the issues of fact in this case.

Instruction No. 12

This being a criminal case, it will require your entire number of twelve to return a verdict. When you have retired to your jury room, you will select one of your number to act as foreman, whose duty it will be to sign whatever verdict you agree upon.

You will take to the jury room the exhibits which have been admitted in evidence, these instructions, and two forms of verdict. One form of verdict, you will use in case you find the defendant Guilty; the other form, you will use in case you find the defendant Not Guilty.

——— ———, *Judge.*

14 In Superior Court of Klickitat County

[Title omitted.]

Defendant's proposed instructions

Filed May 10, 1940

15 Instruction No. 1.

You are instructed to return a verdict in this case finding the defendant Not Guilty.

Instruction No. 2

You are instructed that the Yakima Indian Treaty of June 9, 1855, contains the following provision:

"The exclusive right of taking fish in all the streams, where running thru or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as, also, the right of taking fish at all usual and accustomed places in common with the citizens of the territory, and of erecting temporary buildings for curing them; * * *

and that by this treaty provision there was secured to and vested in the members of said Yakima Tribe of Indians a perpetual right of fishing in their usual and accustomed places off the Yakima Indian Reservation without interference in the exercise of said right by the State of Washington, and that the State of Washington has no right to compel such Indian fishermen to obtain licenses from said state to fish at these usual and accustomed places.

And you are, therefore, further instructed that even though you should find from the evidence, beyond all reasonable doubt, that the defendant, Sampson Tulee, at the time and place alleged in the amended information did catch certain food fish, to wit, Salmon, and did sell the same commercially, without first having obtained a license for the taking thereof as required by section 5703 of Remington's Revised Statutes of Washington, you should, nevertheless, return a verdict of not guilty if you also find from the evidence that the defendant was, at said time, a member of the Yakima tribe of Indians and that the said place mentioned in the amended information was a usual and accustomed fishing place of the said Yakima tribe of Indians, as defined in said Yakima Indian treaty.

16 In Superior Court of Klickitat County

[Title omitted.]

Instructions of court

Filed May 10, 1940

[File endorsement omitted.]

17 Instruction No. 1

Members of the Jury:

This is a criminal action, in which the State of Washington is plaintiff and Sampson Tulee is defendant. The State, by the Prosecuting Attorney, has charged the defendant with the crime of Illegal Taking and Sale of Commercial Food Fish alleged to have been committed as follows:

That on or about the 6th day of May 1939, and within the last year immediately preceding the filing of this Amended Information, at Spearfish on the Columbia River in Klickitat County, Washington, the above-named Sampson Tulee, a member of the Yakima Indian Tribe, then and there being, did then and there catch, at one of the usual and accustomed ancient fishing places of said Yakima Tribe of Indians as defined in the Yakima Indian Treaty of June 9, 1855 (12 Stat. 951), and off the Reservation of said Indians, certain food fish, to wit: salmon, and did then and there sell the same commercially without first having obtained a license for the taking thereof as required by Section 5703, Remington's Revised Statutes of Washington.

Instruction No. 2

To this information the defendant has interposed a plea of not guilty, thus raising every issue in this case and making it necessary for the State to prove to your satisfaction beyond a reasonable doubt every material element of the crime with which the accused stands charged.

Instruction No. 3

You are instructed that the Laws of the State of Washington provide that every person, firm, or corporation using a dip bag net for the taking of salmon in the Columbia River shall pay therefor a license of $5.00 per year.

18 Instruction No. 4

You are instructed that the State of Washington has the right to regulate the taking of fish within its boundaries and in streams

not included in or bordering upon the Yakima Indian Reservation. You are further instructed that this right of regulation includes the right of fixing licenses and providing for penalties in the event of noncompliance with whatever regulations are enacted. You are further instructed that the defendant Sampson Tulee is subject to these regulations so long as he is fishing on streams not included in or bordering upon the Yakima Indian Reservation, and that the fact of his being a member of the Yakima tribe of Indians must not be considered so far as these regulations are concerned.

Instruction No. 5

If it has appeared to you that the Court, during the trial or in the giving of these instructions, has commented on the evidence, or indicated in any manner its opinion of the weight or convincing effect of any of the testimony, you shall disregard such comment entirely, for it is the jury and not the Court which must decide the issues of fact in this case.

Instruction No. 6

The jury is further instructed that the doubt which entitles the defendant to an acquittal must be a doubt for which a reason exists. You are not to go beyond the evidence to hunt up doubts, nor must you entertain such doubts as are merely vague, imaginary, or conjectural. A reasonable doubt is such a doubt as exists in the mind of a reasonable man after he has fully, fairly, and carefully compared and considered all of the evidence or lack of evidence introduced on the trial. If, after a careful consideration and comparison of all the evidence, you can say you have an abiding conviction of the truth of the charge,
19 you are satisfied beyond a reasonable doubt.

Instruction No. 7

You are the sole judges of the evidence in this case, of the credibility of the witnesses and of the weight to be accorded to the evidence received.

In considering the credibility of any witness and the weight to be given to his testimony, you should take into consideration his appearance and demeanor upon the stand, his manner of testifying, his apparent candor and frankness or bias, if either be shown, his means of knowledge or observation of the matters concerning which he has testified, the probability or improbability of the story which he relates, and his interest, if any, in the event of this action.

Instruction No. 8

A person accused of crime is presumed to be innocent. This presumption is not a matter of form merely which the jury may disregard at pleasure, but continues throughout the trial until the same shall have been removed or overcome by proof of guilt beyond a reasonable doubt.

Instruction No. 9.

These instructions are given by the Court as a whole and are so to be considered by the jury. Each and every instruction is to be considered in connection with all of the other instructions given.

Instruction No. 10

If you find that the State has proved to you beyond reasonable doubt all the elements of instruction no. 1, you will find the defendant guilty of illegal taking of food fish; to wit, salmon, on the other hand, if you find that the State has failed to prove all the elements beyond reasonable doubt, you will find the defendant not guilty.

Instruction No. 11

In conclusion let me remind you that each of you have taken a solemn oath that you will well and truly try this case and a true verdict render upon the evidence given on the trial and upon the law as now given you by the Court.

You have nothing whatever to do with the punishment to be inflicted in case of a violation of the law. The fact that punishment may follow a conviction cannot be considered by you, except insofar and only so far as it may tend to make you careful.

Neither must you allow yourself to be moved in the least by sympathy or influenced by prejudice. The question of guilt or innocence is a question of fact, not a question of prejudice or of what the punishment shall be. If, as a matter of fact, from the evidence, the defendant is guilty, no amount of sympathy will make him innocent. If he is innocent, no amount of prejudice will make him guilty. For, regardless of what the penalty may be, regardless of any feeling of sympathy or prejudice, the defendant is upon the evidence and the evidence alone, either guilty or not guilty. What is the true verdict as shown by the evidence is the one question before you.

Instruction No. 12

This being a criminal case, it will require your entire number of twelve to return a verdict. When you have retired to your

jury room, you will select one of your number to act as foreman, whose duty it will be to sign whatever verdict you agree upon.

You will take to the jury room the exhibits which have been admitted in evidence, these instructions, and two forms of verdict. One form of verdict, you will use in case you find the defendant Guilty; the other form, you will use in case you find the defendant Not Guilty.

J. E. STONE, *Judge.*

21 In Superior Court of Klickitat County

[Title omitted.]

Verdict.

Filed May 10, 1940

We, the Jury in the case of State of Washington, Plaintiff vs. Sampson Tulee, Defendant, find the defendant Guilty.

E. O. SHIPP, *Foreman.*

[File endorsement mitted.]

22 In Superior Court of Klickitat County

No. C. 672

THE STATE OF WASHINGTON, PLAINTIFF

vs.

SAMPSON TULEE, DEFENDANT

Judgment and sentence

May 10, 1940

On this 10th day of May 1940, comes Edgar H. Canfield, Prosecuting Attorney for the County and State aforesaid, and the said Defendant in this action is brought to the bar of this Court here, and with him comes his Counsel, Sam M. Driver, U. S. Attorney, Kenneth R. L. Simmons, and Lyle Keith and being asked if he has any legal cause to show why judgment of the Court should not be pronounced against him, says nothing, unless as he before has said; and it appearing to the Court by the verdict of the jury that the Defendant is guilty of the crime of Illegal Taking and Sale of Commercial Food Fish Whereupon, all and singular, the premises being seen and by the Judge of the Court here fully understood, it is ordered, adjudged, and

decreed by said Court that the said Defendant is guilty of the crime of Illegal taking and Sale of Commercial Food Fish as charged, and that he be punished therefor by a fine in the sum of $25.00 and costs of this action.

Signed in the presence of the defendant in open Court this 10th day of May 1940.

J. E. STONE,
Judge of the Superior Court Aforesaid.

[File endorsement omitted.]

23 In Superior Court of Klickitat County

[Title omitted.]

Motion for new trial

Filed May 10, 1940

Comes now the defendant Sampson Tulee and moves the court for a new trial in the above entitled action for the following causes:

1. Insufficiency of the evidence to justify the verdict and that said verdict is against law.
2. Error in law occuring at the trial and excepted to at the time by the defendant.

SAM M. DRIVER,
KENNETH R. L. SIMMONS,
LYLE KEITH,
Attorneys for the Defendant.

Service acknowledged and copy received this 10th day of May 1940.

EDGAR H. CANFIELD,
Pros. Atty.

[File endorsement omitted.]

24 In Superior Court of Klickitat County

[Title omitted.]

Order denying motion for new trial

Filed May 10, 1940.

This matter coming on regularly for hearing on motion of the defendant, Sampson Tulee, for a new trial, and the court having duly considered the same, and being fully advised in the premises, it is now therefore

Ordered that the motion for new trial of the defendant, Sampson Tulee, be and the same is hereby denied on each and every ground therein stated and set forth.

Defendants excepts and his exception is hereby allowed.

J. E. STONE, *Judge.*

Presented by:

SAM M. DRIVER,
Attorney for Defendant.

Approved as to form

EDGAR H. CANFIELD,
Attorney for Plaintiff.

[File endorsement omitted.]

25 In Superior Court of Kliekitat County

[Title omitted.]

Notice of appeal

Filed May 10, 1940

To the STATE OF WASHINGTON, PLAINTIFF, AND TO EDGAR H. CANFIELD, and TED H. LITTLE, ITS ATTORNEYS:

Notice is hereby given by the defendant, Sampson Tulee, that he appeals to the Supreme Court of the State of Washington from the verdict of guilty, the judgment of conviction, and the sentence imposed thereunder, and from all adverse rulings rendered by the above-entitled court during the trial of said cause, and from the order of said court denying the motion of the defendant, Sampson Tulee, for arrest of judgment and from the order of said court denying said defendant's motion for new trial, rendered in the Superior Court of the State of Washington, in and for Klickitat County, in the above-entitled proceedings, on May 10th, 1940.

Dated this 10th day of May 1940.

SAM M. DRIVER,
KENNETH R. L. SIMMONS,
LYLE KEITH,
Attorneys for the Defendant.

Service acknowledged and copy received this 10th day of May 1940.

EDGAR H. CANFIELD,
Attorney for Plaintiff.

[File endorsement omitted.]

26 [Clerk's certificate to foregoing transcript omitted in printing.]

29 In Supreme Court of Washington

No. 28079 En Banc

STATE OF WASHINGTON, RESPONDENT

v.

SAMPSON TULEE, APPELLANT

Filed Jan. 13, 1941

Opinion

Defendant herein, Sampson Tulee, a member of the Yakima tribe of Indians, was charged by information filed in the superior court for Klickitat county, Washington, with the offense of having, May 6, 1939, caught salmon and food fish with a dip bag net, and with selling commercially the fish which he had caught, all without first having obtained a license to fish, as required by Rem. Rev. Stat. (Sup.), § 5703. Tulee claiming that under the treaty of June 9, 1855 (12 U. S. Stat. 951), he, as a member of the Yakima tribe of Indians, had the right to catch fish as he did, the United States, on behalf of its ward, Sampson Tulee, the defendant, petitioned the United States district court for the eastern district of Washington for a writ of habeas corpus. After due proceedings had, the United States district court held that the right secured to the Yakima tribe of Indians by the treaty referred to was subject to the paramount and superior right of the state, in the exercise of its sovereign police powers, to reasonably regulate the taking of salmon from the waters within its jurisdiction, and denied the petition for the writ. On appeal to the United States circuit court, that court held that while it had jurisdiction of the case, it was not a proper cause for the exercise of such jurisdiction, and, following the rule laid down in the case of United States ex rel. Kennedy v. Tyler, 269 U. S. 13, held that the cause should be tried in the state courts, subject to review of any judgment of this court before the
30 supreme court of the United States.

The cause then proceeded before the superior court for Klickitat county on an amended information charging defendant with having caught, at one of the usual and accustomed ancient fishing places of the Yakima tribe of Indians, as defined in the treaty above referred to, certain food fish and salmon, and selling the same commercially without having obtained a license for the taking thereof, as required by the state law. On arraignment defendant entered a plea of not guilty, and demurred to the information on the grounds that the facts charged do not constitute a

crime, and that the information contained matter which, if true, constitutes a legal bar to the action. The demurrer was overruled by the trial court, and the action proceeded to trial before the court and jury. Defendant objected to the introduction of any testimony, and moved for a directed verdict of not guilty, his objection and motion having been overruled. The jury returned a verdict of guilty, whereupon defendant moved in arrest of judgment and for a new trial. These motions having been denied, judgment was entered upon the verdict, and sentence imposed. Defendant was admitted to bail, and appeals to this court from the judgment of guilty and sentence imposed thereon.

Error is assigned upon the overruling of appellant's demurrer to the amended information; upon the overruling of his objections to the introduction of any evidence; upon the denial of his motion for a directed verdict; and upon the denial of his motions in arrest of judgment or for a new trial. Appellant also assigns error upon certain instructions given by the court, and upon the refusal of the trial court to give two instructions which appellant requested.

The only question raised upon this appeal is whether appellant, as a member of the Yakima tribe of Indians, was, under the treaty between the United States and the Yakima tribe, entitled to catch fish in the Columbia river, without the territorial limits of the Yakima Indian reservation, without regard to the statutes of the state of Washington covering the taking of food fish from the lakes and rivers within this State.

During the latter part of May and the first part of June 1855, the United States, represented by Governor Isaac I. Stevens, who was governor of the then territory of Washington, and also the agent of the United States for dealing with the Indian tribes inhabiting the territory, held a council with the Yakima Indians and other tribes, at Walla Walla valley, Washington Territory. As the result of this council, the treaty of June 9, 1855, between the United States and the Yakima tribe, was signed. By this treaty the territorial limits of the reservation assigned to the Yakimas were fixed. The portion of the treaty pertinent to the facts in the case at bar is the second paragraph of article III, which reads as follows:

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them * * *"

We are not here concerned with the right of the Indians to take fish from the streams running through or bordering upon the

reservation. We are concerned only with the latter portion of the paragraph of the treaty quoted, which secured to the Indians the right to fish "at all usual and accustomed places, in common with citizens of the Territory."

All treaties with Indian tribes are construed by the courts in favor of the Indians, in an endeavor to exercise toward them the highest degree of good faith, because of the dominant position of the United States government. United States v. Kagama, 118 U. S. 375; Choctaw Nation v. United States, 119 U. S. 1; Jones v. Meehan, 175 U. S. 1; United States v. Winans, 198 U. S. 371.

At the time of the making of the treaty, the then territory of Washington was largely wild land, sparsely inhabited.
32 The Yakimas were a powerful tribe, and the making of the treaty with them was an important step in the process of establishing orderly government and providing for the settlement of the territory. Fishing was an important part of the life of the Indians, and the right secured to the tribe to catch fish not only on the reservation but at other accustomed fishing places off the reservation, was then to them a valuable right.

In connection with this treaty, appellant earnestly invites our attention to a certified copy of the minutes of the proceedings of the council above referred to, held between representatives of the United States and various bands of Indians, including the Yakima tribe, which resulted in the treaty of June 9, 1855. Governor Isaac I. Stevens, the senior representative of the United States present, as shown by the minutes of the council, repeatedly assured the Indians that they would not be wronged, that their treaty rights would be protected, and that the provisions of the treaty would be faithfully carried out. The minutes show that on June 5th, Governor Stevens assured the Indians that they would be allowed to go to the usual fishing places and fish in common with the whites.

In the early case of Johnson v. McIntosh, 21 U. S. 543, the court recognized the rights of the Indians, saying: "All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy."

This court, in the case of Pioneer Packing Co. v. Winslow, 159 Wash. 655, 294 Pac. 557, held that the state had no jurisdiction over the Indians, in so far as their right to fish in streams flowing through or bordering upon the Yakima reservation was secured to them by the treaty above referred to.

In interpreting Indian treaties, the rule has been followed that rights not expressly granted by the Indians are reserved to them. Winters v. United States, 207 U. S. 564.

33 On several different occasions this court has considered the question here presented. While admitting the force

of our previous decisions, appellant asks that this question be reexamined, particularly in the light of the record of the council between Governor Stevens and the Indians above referred to, the existence of which record was not known at the time the prior cases were decided.

In the case of State v. Towessnute, 89 Wash. 478, 154 Pac. 805, it appeared that the defendant was charged with violation of the state game laws governing the taking of food fish. The defendant, a member of the Yakima tribe, had caught salmon at a point on the Yakima river several miles outside of the Yakima reservation. The defendant had not procured a fishing license, and had snagged the salmon with a gaff hook, thereby admittedly violating the state game law and rendering himself subject to prosecution, unless the clause of the treaty hereinabove quoted gave him the right to fish at the point on the Yakima river where he had taken the salmon, free from the limitations provided by the statutes of this state. The trial court sustained the defendant's demurrer to the information and dismissed the proceeding. On appeal this court reversed the trial court, holding that the information was good, and that the demurrer thereto was erroneously sustained.

In the case of State v. Alexis, 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041, the right of a member of the Lummi tribe of Indians under the treaty entered into in 1859 between the United States and the Lummi tribe, to fish outside of the Lummi reservation, was considered. The treaty with the Lummis contained a provision similar to that contained in the treaty with the Yakimas. In the superior court the defendant was convicted of violating the state statutes regulating the taking of fish, and on appeal the conviction was affirmed, this court, in a short
34 per curiam opinion, stating that the same question was presented as that which the court had just decided in the Towessnute case, *supra*. On petition for rehearing, this court, in a supplemental per curiam opinion, referred to certain testimony introduced before the trial court, which it was contended showed some contemporaneous interpretation of the treaty in favor of the rights of the Indians to fish, and also showed some statements on the part of Governor Stevens referring to the rights of the Indians under the treaty. The court approved the original opinion in the case.

In State v. Meninock, 115 Wash. 528, 197 Pac. 641, it appeared that four members of the Yakima tribe had been charged with fishing in the Yakima river, in violation of the state fisheries code. The place where the defendants had taken fish was outside the Yakima reservation, but fell within the provision of the treaty with the Yakimas with which we are here concerned.

The four cases were consolidated on appeal, and by a decision of this court sitting en banc, the judgments appealed from, by which the defendants were found guilty before the superior court, were affirmed.

In the case of State v. Wallahee, 143 Wash, 117, 255 Pac. 94, the defendant, a member of the Yakima tribe, was charged with having in his possession, on a date specified, a dead female deer. It was admitted that the defendant killed the deer outside the boundaries of the Yakima reservation, while hunting upon open and unclaimed lands belonging to the United States. The treaty with the Yakimas reserved to the Indians the right to take game on any open and unclaimed government lands. The defendant was convicted before the superior court of violation of the game law, and on appeal the judgment was affirmed.

On behalf of the state of Washington, respondent herein, it is argued that Rem. Rev. Stat. (Sup.), § 5703, providing for the issuance of licenses authorizing the licensee to fish within the waters of this state, is a lawful exercise of the police
35 power of the state in regulating fishing within its borders. Respondent relies upon the proposition that the powers of the Federal government are limited to those granted to it either expressly or by implication in the constitution of the United States, all other powers being reserved to the states. This matter was discussed by the supreme court of the United States in the case of Prigg v. Pennsylvania, 41 U. S. 539, in which the court used the following language:

"To guard, however, against any possible misconstruction of our views, it is proper to state that we are by no means to be understood, in any manner whatsoever, to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within territorial limits of the states, and has never been conceded to the United States."

In the case of Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, is found the following:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grants; and that all contract and property rights are held subject to its fair exercise."

Upon admission to the union, a state assumes all the rights and powers the exercise of which is enjoyed by her sister commonwealths, each state, regardless of the date of its admission to the

union, standing on a basis of equality with the other states. Coyle v. Smith, 221 U. S. 559.

In the case of Ward v. Race Horse, 163 U. S. 504 (cited in the case of State v. Towessnute, supra), the supreme court had before it for consideration a question very similar to that here presented. The case is of great interest, for the reason that it lays down principles applicable to several phases of the case at bar. It appeared that by the treaty of 1869 between the United States and the Bannock Indians, it was agreed that the Indians

"* * * shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

36 Prior to the making of this treaty, Congress had established the territory of Wyoming, the act creating a territory providing that nothing therein contained should impair the treaty rights of the Indians as they then existed. In 1890, Wyoming was admitted to the union, and in 1895 the state legislature enacted a statute regulating the killing of wild game. Thereafter the defendant in the case, one Race Horse, a Bannock Indian, was charged with killing elk upon unoccupied land of the United States, in violation of the state statute. The defendant relied upon the treaty above referred to. The case went before the supreme court of the United States by way of a writ of habeas corpus. In the course of the opinion, in which it was held that the defendant could not avail himself of the provisions of the treaty between the United States and his tribe, the court stated:

"The act which admitted Wyoming into the Union, as we have said, expressly declared that that State should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule * * *

"The power of all the States to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the State of Wyoming, that State would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the State. Wyoming, then, will have been admitted into the Union, not as an equal member,

but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence. Nor need we stop to consider the argument advanced at bar, that as the United States, under the authority delegated to it by the Constitution in relation to Indian tribes, has a right to deal with that subject, therefore it has the power to exempt from the operation of state game laws each particular piece of land, owned by it in private ownership within a State, for nothing in this case shows that this power has been exerted by Congress. The enabling act declares that the State of Wyoming is admitted on equal terms with the other States, and this declaration, which is simply an expression of the general rule, which presupposes that States, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the States already admitted, repels any presumption that in this particular case Congress intended to admit the State of Wyoming with diminished governmental au-
37 thority. The silence of the act admitting Wyoming into the Union, as to the reservation of rights in favor of the Indians, is given increased significance by the fact that Congress in creating the Territory expressly reserved such rights. Nor would this case be affected by conceding that Congress, during the existence of the Territory, had full authority in the exercise of its treaty making power to charge the Territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a Territory it would be also within the power of Congress to continue them in the State, on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the State, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission."

The Race Horse case is strikingly like that here presented. The act of Congress of March 2, 1853 (10 U. S. Stat. 172), providing for the organization of the territory of Washington, contains a provision with respect to treaties with Indian tribes, similar to that contained in the act which organized the territory of Wyoming. In the Race Horse case, the Indian relied upon a provision of the treaty securing to the Indians the right to hunt upon the unoccupied lands of the United States, so long as peace subsisted. In the case at bar, the treaty with the Yakimas secured to them the right to hunt upon open and unclaimed lands belonging to the United States (State v. Wallahee, *supra*), in addition to the right to fish at their accustomed fishing places without the reservation. The organic act creating each territory preserved treaty rights enjoyed by the Indians. The enabling acts by which

Washington and Wyoming were admitted to the union, while differing somewhat in wording, are essentially the same.

It has several times been held that the treaty with the Yakimas established in favor of the Indians a perpetual servitude on the lands necessary for their use in taking fish at their accustomed fishing places without the boundaries of the reservation, and that lands conveyed by the United States or by the state are subject to this easement. United States v. Winans, 198 U. S. 371; Seufert Bros. Co. v. United States, 249 U. S. 194; United States v. Taylor, 3 W. T. 88, 13 Pac. 333. There is, then, no dissent to the proposition that under the treaty the Indians are entitled
38 to an easement on, over and across such lands as they must use in enjoying the full benefit of their fishing rights.

In connection with the question to be here determined, the case of People ex rel. Kennedy v. Becker, 241 U. S. 556, is of interest. Three members of the Seneca tribe of Indians were arrested by the authorities of the state of New York, charged with having in their possession certain fish in violation of the state conser a-tion law. The defendants contended that as members of the Seneca tribe they were entitled to catch fish as they did, under a treaty made in the year 1797 between the Seneca nation and Robert Morris, which treaty or convention had been made under authority of the United States, and had been ratified by the senate and proclaimed by the president. By the treaty the Indians reserved to themselves and their heirs the privilege of fishing and hunting on the land conveyed. Discussing this right, the court said:

"The right thus reserved was not an exclusive right. Those to whom the lands were ceded, and their grantees, and all persons to whom the privilege might be given, would be entitled to hunt and fish upon these lands, as well as the Indians of this tribe. And, with respect to this nonexclusive right of the latter, it is important to observe the exact nature of the controversy. It is not disputed that these Indians reserved the stated privilege both as against their grantees and all who might become owners of the ceded lands. We assume that they retained an easement, or profit á prendre, to the extent defined; that is not questioned. The right asserted in this case is against the State of New York. It is a right sought to be maintained in derogation of the sovereignty of the State. It is not a claim for the vindication of a right of private property against any injurious discreimination, for the regulations of the State apply to all persons equally. It is the denial with respect to these Indians, and the exercise of the privilege reserved, of all state power of control or reasonable regulation as to lands and waters otherwise admittedly within the jurisdiction of the State.

"It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the State (Geer v. Connecticut, 161 U. S. 519; Ward v. Racehorse, 163 U. S. 504, 507), subject of course to any valid exercise of authority under the provisions of the Federal Constitution. It is not denied—save as to the members of this tribe—that this inherent power extended over the locus in quo and to all persons attempting there to hunt or fish, whether they are owners of the lands or others. The contention for the plaintiffs in error must, and does, go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty quoad hoc. As the plaintiffs in error put it: 'The land itself became
39 thereby subject to a joint property ownership and the dual sovereignty of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be.' We are unable to take this view. It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the locus in quo, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.

"It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing to which the legislation in question was addressed. Adopted when game was plentiful—when the cultivation contemplated by the whites was not expected to interfere with its abundance—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But the existence of the sovereignty of the State was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. This was clearly recognized in United

States v. Winans, 198 U. S. 371, 384, where the court in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859, said (referring to the authority of the State of Washington): 'Nor does it' (that is, the right of 'taking fish at all usual and accustomed places') 'restrain the State unreasonably, if at all, in the regulation of the right.' It only fixes in the land such easements as enable the right to be exercised."

The court cited the Race Horse case, and upheld the authority of the state of New York, as sought to be exercised pursuant to its conservation law.

In The Cherokee Tobacco case, 78 U. S. 616, it was held that under the Federal internal revenue laws, a tax could be imposed upon tobacco grown by members of the Cherokee nation upon lands within the Cherokee reservation, notwithstanding a provision of the treaty between the United States and the Cherokee nation exempting the members of the tribe from the payment of any tax on farm products, "which is now or may be levied by the United States on the quantity sold outside of the Indian territory." Referring to the conflict between the internal revenue laws and the Indian treaty, the court said: "Undoubtedly one or the other must yield. The repugnancy is clear and they cannot stand together." In the course of its opinion, the court said:

"It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. In the cases referred to these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done the power of redress is with Congress, not with

the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief."

It was held that the treaty provisions must yield to the Federal laws providing for the collection of taxes.

In the case of Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, the supreme court upheld the right of the state of California to proceed under its fish and game code, even though the enforcement of the act indirectly acted as a deterrent to the right to purchase fish taken on the high seas, and might incidentally affect interstate or foreign commerce.

In the case of Patsone v. Commonwealth of Pennsylvania, 232 U. S. 138, the supreme court upheld a statute of the state prohibiting the killing of wild game by aliens, and held that a citizen of Italy, who claimed exemption from the act by reason of a treaty between the United States and the kingdom of Italy, by which the citizens of the two nations were assured the enjoyment of certain rights and privileges, was subject to prosecution under the state law, notwithstanding the provisions of the treaty. It was held that no provision of the treaty operated to deprive
41 the states of the exercise of their powers to the full extent.

In the case of Geer v. Connecticut, 161 U. S. 519, the supreme court considered the rights of the states to control the export of wild game, saying.

"Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected."

In the case of State v. Morrin, 136 Wis. 552, 117 N. W. 1006, the supreme court of Wisconsin affirmed a finding of guilty entered against a Chippewa Indian who had trapped fish with gill nets, contrary to the state game law. The defendant relied upon a treaty between the United States and the Chippewa Indians, securing to the latter the "right to hunt and fish therein until otherwise ordered by the President." It was held that, pursuant to the Race Horse case and other authorities cited, the treaty did not operate to confer upon the defendant the right to fish in violation of the state game law. The court also observed that the defendant had acquired United States citizenship and was not living on the reservation, and for that reason was not entitled to claim the benefit of any treaty rights. The decision was based upon both grounds.

In the case of People v. Chosa, 252 Mich. 154, 233 N. W. 205, the supreme court of Michigan upheld the right of a state to enforce its game laws against Indians who attempted to hunt and fish on lands which their tribe had ceded to the United States, the Indians claiming such rights under a treaty with the Federal government. It was stipulated that the defendants were entitled to enjoy "all the treaty rights and privileges" of the treaty. It was held that the defendants were "subject to the game laws of the state, on the lands covered by the treaties, to the same extent as the general public." The court also considered the question of the Indians' citizenship.

42 Under the authorities, it is clear that the state of Washington enjoys to the full the exercises of its police power, as an equal of the other states making up our Federal Union, including the original thirteen. Under the treaty, the members of the Yakima tribe are entitled to an easement to cross and use lands necessary to the enjoyment of their fishing rights at their old accustomed fishing places. Lands granted by the United States or the state remain subject to this servitude.

The minutes of the council between Governor Stevens and the Indians, at which council the treaty was made and executed, constitute a most interesting historical record, and show, as argued by appellant, that Governor Stevens, doubtless in the exercise of the utmost good faith, assured the Indians that the Federal government would faithfully carry out all terms and conditions of the treaty. To this day, the vast domain set apart to the tribe, comprising many acres of rich land, is enjoyed by the members of the Yakima tribe. Under the authorities, however, it must be held that as to the right of the Indians to fish at points without the reservation, which right was secured to them by the treaty "in common with citizens of the territory," such right has been limited by the statutes of the state of Washington governing the taking of fish and wild game, and that the decisions of this court hereinabove referred to correctly declared the law, and should be followed in the case at bar.

As observed by the supreme court of the United States in The Cherokee Tobacco case, supra, consideration of such a situation as this, if a wrong has been done, pertains to the legislative department of the government, the correction of the wrong, if one exists, being "beyond the sphere of judicial cognizance."

43 The judgment appealed from is accordingly affirmed.

BEALS, J.

We concur:

MAIN, J.

STEINERT, J.

ROBINSON, C. J.

JEFFERS, J.

44 In Supreme Court of Washington

Dissenting opinion

Filed Jan. 13, 1941

SIMPSON, J., Dissenting: I am unable to agree with the conclusion reached by the majority.

The pertinent provisions of the treaty are contained in subparagraph 2 of Article 3, which reads as follows:

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is futher secured to said confederated Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; * * *"

All Indian Treaties are construed liberally by our courts in good faith and in favor of the Indians, because of the dominant position of the United States. Worcester v. Georgia, 31 U. S. 515; United States v. Kagama, 118 U. S. 375; Choctaw Nation v. United States, 119 U. S. 1; Jones v. Meehan, 175 U. S. 1; United States v. Winans, 198 U. S. 371.

In the Worcester case, supra, the Supreme Court of the United States said:

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend, that the word 'allotted,' in reference to the land guaranteed to the Indians, in certain treaties, indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. *How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.*

"The question may be asked, is no distinction to be made between a civilized and savage people? Are our Indians to be placed upon a footing with the nations of Europe, with whom we have made treaties? The inquiry is not, what station shall now be given to the Indian tribes in our country? but what relation have they sustained to us, since the commencement of our government? We have made treaties with them; and are those treaties to be disregarded on our part, because they were entered into with an uncivilized people? Does this lessen the obligation of such treaties? By entering into them, have we not admitted

the power of this people to bind themselves, and to impose obligations on us?" [Italics mine.]

In the Jones case, supra, that court again announced the rule of construction in the following language:

45 "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and *that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.*" [Italics mine.]

Rights not expressly granted in treaties with the Indians are reserved by them. Winters v. United States, 207 U. S. 564.

Having this rule in mind, let us view the situation surrounding the making of the treaty of 1885 entered into between the Federal Government and various Indian Tribes of the northwest, including the Yakimas, of which appellant is a member.

The meeting at which the treaty was arranged was held at the Council Grounds in Walla Walla Valley. It started May 18, 1855, and ended June 11, 1855. Governor Isaac I. Stevens of the Territory of Washington and General Joel Palmer of the Territory of Oregon represented the United States Government, and chiefs of the various tribes represented the Indians. Many speeches were made by those present, chiefly by Governor Stevens and General Palmer.

As a result of the treaty, 16,920 square miles of territory were ceded to the United States by the Indians and 1,233 square miles of land were retained by the Indians in two reservations.

Among other things, Governor Stevens told the Indians,

"We have near to our hearts the property of the Indians and the propositions to be made to you will prove it."

Speaking of the tracts to be retained by the Indians, he said:

"On each tract we wish to have one or more schools; we want on each tract one or more blacksmiths; one or more car-

46 penters; one or more farmers; we want you and your children to learn to make ploughs, to learn to make waggons, and everything which you need in your house. We want your women and your daughters to spin, and to weave and to make clothes. We want to do this for a certain number of years.

"Then you the men will be farmers and mechanics, or you will be doctors and lawyers like white men; your women and your daughters will then teach their children, those who come after them to spin, to weave, to knit, to sew, and all the work of the house and lodges, you will have your own teachers, your own farmers, blacksmiths, wheelwrights, and mechanics: besides this we want on each tract a saw mill and a grist mill."

At another time he made the following statement concerning the care which the Government would exercise in order to help the Indians:

"I have spoken of an agent, I will speak more. If we agree at the council we have many things to do for you; the agent will live with you and see that it is done; if you think we have not done our part go to the agent and tell him so, and he will see that we do *do* it. If we think you have not done your part the agent will go to the chiefs and say so frankly and arrange it with them; he will be your elder brother, and will see that you are not wronged, and that the bargain is carried out."

Again, he stated:

"If we make a Treaty with you and our Great Chief and his Council approves it, you can rely on all its provisions being carried out strictly. My heart is that it is wise for you to do so. I will not speak any longer."

Governor Stevens made a definite statement relative to the Indian's right to fish in the following words:

"There is plenty of salmon on these reservations, there are roots and berries. There is also some game. You will be near the Great Road and you can take your horses and your cattle down the river and to the Sound to market. * * *.

"You will be allowed to go to the usual places and fish in common with the whites * * * together with all outside the reservation."

"In the paper for the Yakimas we have included the tribes who acknowledge Kam-i-ah-kan for their head chief. The Piscouse, the Swan-wap-um and Palouse, the Yakamas and all the bands on the Columbia below the Walla Walla down to the White Salmon River. They have their reservation and fishing stations, which they well know and which I understand is satisfactory.

* * * * *

"You will not be called according to the paper to move on the reservation for two or three years; then is secured to you your right to fish, to get roots and berries, and to kill game; then your payments are secured to you as agreed; then your schools, your shops, and physicians and other things we have promised are secured; then the salaries, the houses, and the 10-acre farms of your chiefs are secured to him.

* * * * *

"I will ask of Looking Glass whether he has been told
47 of our Council. Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the reservation on lands not claimed by settlers, *that he can catch fish at any of the fishing stations.* * * * [Italics supplied.]

All of these statements were made in good faith by Governor Stevens at a time when the northwest was very much of a wilderness. They were made at a time when Indians and white men alike hunted and fished as they desired without let or hindrance from the federal or territorial governments. Regulations of fish and game were neither known nor dreamed of. The Indians had from time immemorial fished for salmon on the banks of the Columbia river. The catching of salmon was necessary for the sustenance of themselves and their families. Neither Governor Stevens nor the Indian Chiefs could possibly have visualized present day conditions and present day restrictions. They entered into the treaty agreement under situations which existed at that time. We should interpret and construe the treaty and the rights of appellant in the light of the surroundings present at that time.

Without any doubt whatever, Governor Stevens and the Indians signed the treaty with the definite understanding that the Indians should be forever allowed to catch salmon from the Columbia river without any restrictions whatsoever. We should so construe the treaty.

It may be conceded that there is an ambiguity contained in the treaty. However, that ambiguity, if there is one, should be resolved in favor of the Indians. Winters v. United States, 207 U. S. 564.

The state is not in a position, nor does it have the power, to modify or abrogate a treaty made by authority of the Congress of the United States.

Article I. § 8, of the Federal Constitution, gives to the Congress power

"To regulate commerce with foreign nations and among the several states and with the Indian tribes."

48 The Enabling Act, 1 Rem. Rev. Stat., 333, § 4, Second, recognized the position of the state in disclaiming all title to all lands.

"* * * owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States."

There is a definite procedure insisted upon by the courts when the United States seeks to assert its position of dominance by abrogating or changing an Indian treaty, and that is by the passage of a clear and express Act of Congress which is of such a nature that the treaty and the act cannot in any reasonable view stand together. Cope v. Cope, 137 U. S. 682; Fong Yue Ting v. United States, 149 U. S. 698.

I realize that the majority opinion is founded upon the following decisions of this court: State v. Towessnute, 89 Wash. 478, 154 Pac. 805; State v. Alexis, 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041; State v. Meninock, 115 Wash. 528, 197 Pac. 641; and State v. Wallahee, 143 Wash. 117, 255 Pac. 94.

The last three cases cited are based upon the holding in the Towessnute case, supra. To my mind, that case is entirely wrong in principle, and is founded upon an unjust assumption. It states that the Indians are mere occupants of the soil of America. Not so, they owned it as much or more than we do. Our ancestors took the lands from the Indians by conquest because they had firearms and were better able to destroy than the Indians.

Again, the opinion states, in speaking of the words "in common with citizen":

"These words were not used to give something to the white man, but to give something to the red man; not to give the Indian an advantage, but to save him from disadvantage."

Where did the white man get the land to give? The answer is that all of his rights were derived from the Indians.

49 United States v. Winans, 198 U. S. 371.

The Indians surrendered their land to the white man in consideration of glowing promises of care and protection. When he gave his land away the red man reserved certain rights, among which was the right to fish at accustomed places, a right he had exercised for many, many generations.

It must be said, however, that at the time our former cases were decided, the court did not have the benefit of a report of the proceedings which led to the signing of the treaty under consideration.

The proper disposition of the question and interpretation of the treaty in question was made by the United States Supreme Court in United States v. Winans, supra.

That court held that the Yakima Indians had a right in the real property and an easement for certain express purposes in and to their usual and accustomed fishing places on the Columbia river. The court stated:

"The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. *In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.* And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places,' and the right 'of erecting temporary buildings for curing them.' The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. *And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.*" [Italics supplied.]

Cf., United States v. Powers, 16 F. Supp. 155; United States v. Stotts, 49 F. (2d) 619; United States v. McGowan, 62 F. (2d) 955.

The cases of State v. Towessnute, State v. Alexis, State v. Meninock, and State v. Wallahee, supra, should be reexamined and overruled.

If Governor Stevens was not sincere and the government secured from the Indians the large domain ceded to it by the making of promises it did not intend to keep, and did not keep, then fraud was practiced on the Indians, and the wrong done to them should be rectified.

On the other hand, if the promises made by Governor Stevens were made in good faith, as I am sure they were, then all of the facts relative to the making of the treaty should be considered in arriving at the intent of the parties.

The treaty should be upheld as construed in the Winans case, supra, and the judgment of the trial court reversed.

SIMPSON, *J.*

We concur:

MILLARD, *J.*

BLAKE, *J.*

[File endorsement omitted.]

51 } In Supreme Court of Washington

[Title omitted.]

Motion to stay remittitur

Filed Feb. 10, 1941

Comes now Sampson Tulee, the above named defendant and appellant, by and through his attorney Lyle Keith, and moves the Court for an order staying the execution and enforcement of the judgment of the Superior Court of the State of Washington in and for the County of Klickitat and staying the sending down of a remittitur affirming the judgment of said court for a period of thirty (30) days from this date.

This motion is based upon the records and files herein and upon the affidavit of Lyle Keith hereto attached.

Dated this 10th day of February 1941.

LYLE KEITH,
United States Attorney for the
Eastern District of Washington,
Attorney for defendant and appellant.

Respondent joins in motion herein Feb. 10, 1941.

T. H. LITTLE,
Asst. Atty. Genl. for Resp.

[File endorsement omitted.]

52 In Supreme Court of Washington

[Title omitted.]

Affidavit in support of motion to stay remittitur

STATE OF WASHINGTON,
County of Thurston, ss:

Lyle Keith, being first duly sworn, upon oath deposes and says:

That he is the duly appointed, qualified, and acting United States Attorney for the Eastern District of Washington and that as such he is the attorney for the defendant and appellant herein;

That immediately upon receipt of advice that the judgment of the Superior Court of the State of Washington in and for Klickitat County had been affirmed by this court, notice of that fact was transmitted to the Attorney General of the United States; that as soon as copies of the opinion became available to affiant, copies of said opinion were transmitted to the Attorney General of the United States for study and consideration by the Department of Justice;

That affiant has unqualifiedly recommended to the Attorney General of the United States that an application for writ of certiorari be made to the Supreme Court of the United States of America and that his recommendation has been concurred in by Kenneth R. L. Simmons, who is associated with him in the defense of Sampson Tulee; that affiant is informed and believes that the Bureau of Indian Affairs of the Department of the Interior has recommended to the Attorney General of the United States that an application for writ of certiorari be made;

53 That by law and the rules of the Department of Justice, the determination of whether or not an appeal in any case shall be taken is left with the Solicitor General of the United States;

That affiant has been directed by the Attorney General of the United States to make application for a stay of proceeding so that ample consideration may be given by the Solicitor General to the question of whether or not application for writ of certiorari shall be made.

LYLE KEITH.

Subscribed and sworn to before me this 10th day of February 1941.

[SEAL]

JENNIE M. TATTERSALL,
Notary Public in and for the State of Washington, residing at ——.

54 In the Supreme Court of Washington

[Title omitted.]

Order staying remittitur

Feb. 10, 1941

This matter coming on for hearing on the motion of Lyle Keith, attorney for the defendant and appellant, and for an order staying execution and enforcement of the judgment of the Superior Court of the State of Washington in and for Klickitat County and staying the sending down of the remittitur to said court for a period of thirty (30) days.

It is ordered that the execution and enforcement of the judgment of this court and of the Superior Court of the State of Washington in and for Klickitat County be, and it hereby is, stayed for a period of thirty (30) days from the date hereof;

It is further ordered that a remittitur shall not be transmitted to the Superior Court of the State of Washington in and for the County of Klickitat during said thirty (30) day period.

Done this 10 day of February 1941.

JOHN S. ROBINSON,
Chief Justice of the Supreme Court of the State of Washington.

[File endorsement omitted.]

55 In Supreme Court of Washington

[Title omitted.]

Motion for further stay of remittitur

Filed March 11, 1941

Comes now the State of Washington, respondent in the cause herein, and apprises this Honorable Court that a telegraphic intelligence has been received from the United States District Attorney for the Eastern District of Washington, attorney for the defendant and appellant herein, to the effect that the Solicitor General of the United States has not reached a final decision as to whether the United States Government should apply for a writ of certiorari, and requesting the Attorney General of the State of Washington to join in a petition for a further stay of proceedings in the cause herein.

The Attorney General of the State of Washington concurs in such a petition and now moves this Honorable Court for an order

further staying the execution and enforcement of the judgment of the Superior Court of the State of Washington in and for the County of Klickitat and staying the sending down of a remittitur affirming the judgment of said court for a period of thirty (30) days from this date.

Dated this 11th day of March 1941.

SMITH TROY,
Attorney General,
By T. H. LITTLE,
T. H. Little,
Assistant Attorney General.

[File endorsement omitted.]

56 In the Supreme Court of Washington

[Title omitted.]

Order staying remittitur

March 11, 1941

This matter coming on for hearing on the motion of the Attorney General of the State of Washington by and through T. H. Little, Assistant Attorney General, attorney for respondent, for an order further staying the execution and enforcement of the judgment of the Superior Court of the State of Washington in and for Klickitat County and staying the sending down of the remittitur to said court for a period of thirty days.

It is ordered that the execution and enforcement of the judgment of this court and of the Superior Court of the State of Washington in and for Klickitat County be, and it hereby is, stayed for a period of thirty (30) days from the date hereof;

It is further ordered that a remittitur shall not be transmitted to the Superior Court of the State of Washington in and for the County of Klickitat during said thirty (30) day period.

Done this 11th day of March 1941.

JOHN S. ROBINSON,
Chief Justice of the Supreme Court of the State of Washington.

[File endorsement omitted.]

57 In the Supreme Court of Washington

STATE OF WASHINGTON, RESPONDENT,

vs.

SAMPSON TULEE, APPELLANT

Judgment

April 2, 1941

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Klickitat County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 2nd day of April A. D. 1941, on motion of Smith Troy, Esquire, of counsel for respondent, considered, adjudged, and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said State of Washington have and recover of and from the said Sampson Tulee the costs of this action taxed and allowed at One hundred thirteen and 40/100 ($113.40) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Of record in Volume 35 at page 413 of the records and files of the Supreme Court of the State of Washington.

58 In the Supreme Court of Washington

[Title omitted.]

Motion for further stay of remittitur

Filed April 7, 1941

Comes now the State of Washington, respondent in the cause herein, and apprises this Honorable Court that telegraphic advice has been received from the Department of Justice in Washington, D. C., to the effect that the United States Government has decided to appeal from the decision of the Supreme Court herein, and requests a further order staying the remittitur for a further thirty (30) days or until May 10, 1941.

The Attorney General of the State of Washington is agreeable to such continuance and now moves this Honorable Court for an order further staying the execution and enforcement of the judgment of the Superior Court of the State of Washington in

and for the County of Klickitat; and staying the sending down of a remittitur affirming the judgment of said Court for a period of thirty (30) days from April 10, 1941.

Dated this 5th day of April 1941.

SMITH TROY,
Attorney General,
By T. H. LITTLE,
Asst. Attorney General,
Attorneys for Respondent, State of Washington.

[File endorsement omitted.]

59 In the Supreme Court of Washington

[Title omitted.]

Order staying remittitur

April 7, 1941

This matter came on for hearing on the motion of the Attorney General of the State of Washington, by and through T. H. Little, Assistant Attorney General, attorney for respondent, for an order further staying the execution and enforcement of the judgment of the Superior Court of the State of Washington, in and for Klickitat County, and staying the sending down of the remittitur to said court for a period of thirty (30) days from April 10, 1941, it is

Ordered that the execution and enforcement of the judgment of this court and of the Superior Court of the State of Washington in and for Klickitat County be and hereby is stayed for a period of thirty (30) days from April 10, 1941.

It is further ordered that the remittitur shall not be transmitted to the Superior Court of the State of Washington in and for the County of Klickitat during said thirty (30) day period.

Dated this 7th day of April 1941.

JOHN S. ROBINSON,
Chief Justice.

[File endorsement omitted.]

60 In the Supreme Court of Washington

[Title omitted.]

Motion for further stay of rimittitur

Filed May 8, 1941

Comes now the defendant, Sampson Tulee, appellant, in the above entitled cause, by and through his attorneys, Nathan R.

Margold, Solicitor, Department of the Interior, and Kenneth R. L. Simmons, District Counsel, Department of the Interior, and apprises this Honorable Court that additional time is required by said attorneys to perfect the appeal from the decision of the Supreme Court of the State of Washington herein to the Supreme Court of the United States, and requesting a further order staying the remittitur in said cause for a further thirty (30) days, or until June 9, 1941.

The defendant, Sampson Tulee, through his attorneys, respectfully moves this Honorable Court for an order further staying the execution and enforcement of the judgment of the Superior Court of the State of Washington, in and for the County of Klickitat, and staying the sending down of a remittitur affirming the judgment of said Court for a period of thirty (30) days from May 10, 1941.

Dated this 6th day of May 1941.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior.
KENNETH R. L. SIMMONS,
District Counsel,
Office of the Solicitors, Department of Interior,
Attorneys for Appellant, Sampson Tulee.

[File endorsement omitted.]

61 Due, legal and personal service of the foregoing motion and receipt of a true copy thereof is hereby acknowledged this 6th day of May 1941.

SMITH TROY,
Attorney General for the State of Washington,
T. H. LITTLE,
Assistant Attorney General for the State of Washington,
Counsel for State of Washington, Respondent.

63 In the Supreme Court of Washington

[Title omitted.]

Order staying remittitur

May 8, 1941

This matter coming on for hearing on the motion of Nathan R. Margold, Solicitor, Department of the Interior, and Kenneth R. L. Simmons, District Counsel, Department of the Interior, attorneys

for appellant, Sampson Tulee, for an order further staying the execution and enforcement of the judgment of the Superior Court of the State of Washington, in and for Klickitat County, and staying the sending down of the remittitur to said Court for a period of thirty (30) days from May 10, 1941, it is

Ordered that the execution and enforcement of the judgment of this Court and of the Superior Court of the State of Washington, in and for Klickitat County, be and hereby is stayed for a period of thirty (30) days from May 10, 1941.

It is further ordered that the remittitur shall not be transmitted to the Superior Court of the State of Washington, in and for the County of Klickitat, during the said thirty (30) day period.

Dated this 8th day of May 1941.

WALTER B. BEALS,
Acting Chief Justice,
Supreme Court, State of Washington.

[File endorsement omitted.]

65 In the Supreme Court of Washington

[Title omitted.]

Motion for further stay of remittitur

Filed June 5, 1941

Comes now the defendant, Sampson Tulee, appellant, in the above entitled cause, by and through his attorneys, Nathan R. Margold, Solicitor, Department of the Interior, and Kenneth R. L. Simmons, District Counsel, Department of the Interior, and apprises this Court that additional time is required by said attorneys to perfect the appeal from the decision of the Supreme Court of the State of Washington herein to the Supreme Court of the United States, and requesting a further order staying the remittitur in said cause for the full period of three (3) months after the entry of the final judgment in this cause, entered on April 2, 1941, to and including June 30, 1941.

The defendant, Sampson Tulee, through his attorneys, respectfully moved this Honorable Court for an order further staying the execution and enforcement of the judgment of the Superior Court of the State of Washington, in and for the County of Klickitat, and staying the sending down of a remittitur affirming

the judgment of said Court for a further period from June 9, 1941 to and including June 30, 1941.

66 Dated this 5th day of June 1941.

NATHAN R. MARGOLD, *Solicitor,*
Department of the Interior.
KENNETH R. L. SIMMONS,
District Counsel,
Office of the Solicitor, Department of Interior,
Attorneys for Appellant, Sampson Tulee.

[File endorsement omitted.]

67 Due, legal and personal service of the foregoing motion and receipt of a true copy thereof is hereby acknowledged this 5 day of June 1941.

SMITH TROY,
Attorney General for the State of Washington,
By T. H. LITTLE,
Assistant Attorney General for the State of Washington,
Counsel for State of Washington, Respondent.

No Objections to Motion.
T. H. LITTLE.

69 In the Supreme Court of Washington

[Title omitted.]

Order staying remittitur

Filed June 5, 1941

This matter coming on for hearing on the motion of Nathan R. Margold, Solicitor, Department of the Interior, and Kenneth R. L. Simmons, District Counsel, Department of the Interior, attorneys for appellant, Sampson Tulee, for an order further staying the execution and enforcement of the judgment of the Superior Court of the State of Washington, in and for Klickitat County, and staying the sending down of the remittitur to said Court for a further period from June 9, 1941 to and including June 30, 1941, it is

Ordered that the execution and enforcement of the judgment of this Court and of the Superior Court of the State of Washington, in and for Klickitat County, be and hereby is stayed from June 9, 1941 to and including June 30, 1941.

It is further ordered that the remittitur shall not be transmitted to the Superior Court of the State of Washington, in and for the County of Klickitat, during the period from June 9, 1941 to and including June 30, 1941.

JOHN S. ROBINSON,
Chief Justice Supreme Court,
State of Washington.

[File endorsement omitted.]

71 Supreme Court of the United States

[Title omitted.]

Petition for appeal

Filed June 30, 1941

To the Chief Justice or Presiding Judge of the Supreme Court of the State of Washington:

1. Sampson Tulee, considering himself aggrieved, hereby prays that an appeal to the Supreme Court of the United States be allowed from the final judgment rendered in the above entitled case on April 2, 1941, in the Supreme Court of the State of Washington, the highest court in the state.

2. The said final judgment affirmed a judgment in the Superior Court of the State of Washington for Klickitat County convicting and sentencing appellant for a misdemeanor of which he had been found guilty by a jury after a trial on charges preferred against him by the state in an amended information.

3. The amended information alleged that appellant, "a member of the Yakima Indian Tribe" had caught salmon "at Spearfish on the Columbia River * * * one of the usual and accustomed ancient fishing places of said Yakama Tribe of Indians as defined in the Yakima Indian Treaty of June 9, 1855 (12 Stat. 951); and off
72 the Reservation of said Indians, * * * without first having obtained a license for the taking thereof as required by Section 5703, Remington's Revised Statutes of Washington."

4. As appears more fully from the "Statement as to Jurisdiction" submitted simultaneously herewith by appellant, his defense has been based not on any denial of the truth of the facts alleged in the amended information, but (1) on a claim of right under the said treaty to fish for salmon, in the manner and at the time and place alleged, without interference from the state and without obtaining a license pursuant to the said Section 5703, and (2) on

an insistence that the said Section 5703, if and as interpreted and applied to the conduct for which appellant is being prosecuted in this case, is repugnant to the said treaty of the United States and also to the Constitution of the United States. Each of these grounds of defense has specifically been urged on appellant's behalf at appropriate stages of this litigation. The validity of Section 5703 of the Revised Statutes of the State of Washington on the ground of its being repugnant to a treaty of the United States and on the ground of its being repugnant to the Constitution of the United States was expressly drawn in question in the Superior Court by objections and exceptions of record both to an instruction given by that court to the jury at the request of the state and to a refusal by the court to give certain instructions requested by appellant. The validity of the state statute was again drawn in question on the same grounds before the state Supreme Court by the assignments of error on which the appeal to that court was based; the questions thus raised were fully argued both orally and in printed briefs and were necessarily before the said court, sitting en banc; and the decision in that court, the highest in the state in which a decision could be had in this case, was in favor of the validity of the said state statute. Now, by this petition and by the assignment of errors, statement as to jurisdiction and other papers being submitted herewith, appellant seeks
73 a final and authoritative determination of the said questions by the Supreme Court of the United States.

5. This case is one in which, under the legislation in force when the Act of Congress of January 31, 1928, was passed, a review could be had in the Supreme Court of the United States on writ of error and in which, under the present laws of the United States and rules of the said court, appellant is now entitled to such a review on appeal.

6. No previous application has ever been made for the relief prayed for herein.

Wherefore, Sampson Tulee prays (1) that an appeal to the Supreme Court of the United States be allowed from the final decision and judgment rendered in this case on April 2, 1941, in the Supreme Court of the State of Washington, in order that the said decision and judgment may be reviewed and reversed, and (2) that the Clerk of the Supreme Court of the State of Washington be directed to make and transmit to the Supreme Court of the United States, under his hand and the seal of the Supreme Court of the State of Washington, a true copy of the material parts of the record herein to be designated by praecipe or stipulation of the parties or their counsel herein, as provided by law and

in conformity with the rules of the Supreme Court of the United States.

Dated, June 30, 1941.

NATHAN R. MARGOLD,
Nathan R. Margold,
Solicitor of the United States
Department of the Interior,
Washington, D. C.,
KENNETH R. L. SIMMONS,
Kenneth R. L. Simmons,
District Counsel,
Office of the Solicitor of the United States Department of the Interior, Fratt Building, Billings, Montana,
Counsel for Appellant.

74 Supreme Court of the United States

[Title omitted.]

Assignment of errors

Filed June 30, 1941

Sampson Tulee, defendant in the above entitled case and applicant for the allowance for an appeal to the Supreme Court of the United States, assigns the following errors in the record and proceedings in the said cause:

The Supreme Court of the State of Washington erred:

1. In affirming the judgment of conviction and sentence entered against him in the Superior Court of the State of Washington for Klickitat County.

2. In holding that Section 5703, Remington's Revised Statutes of the State of Washington was applicable to the exercise of his fishing rights under the Treaty of June 9, 1855 between the Yakima Nation of Indians and the United States (12 Stat. 951) involved in this case.

3. In holding that the said Section 5703, as so applied, is a valid exercise of regulatory power residing in the State of Washington.

4. In failing to hold that the said Section 5703, as so applied, is repugnant to the said treaty and invalid.

5. In failing to hold that the said Section 5703, as so applied, is repugnant to the Constitution of the United States and invalid on the ground that it attempts to regulate and restrict a subject matter relating to an Indian ward of the United States with respect to which the United States is exercising a protective

75 interest in favor of the said Indian and which is therefore exclusively within the jurisdiction and power of the United States.

6. In failing to reverse the said judgment on the grounds (a) that the trial court erred in overruling defendant's demurrer to the amended information; (b) that the trial court erred in denying defendant's motion for a directed verdict; (c) that the trial court erred in granting plaintiff's request for instruction No. 4 and in giving the said instruction to the jury; (d) that the trial court erred in refusing to grant defendant's requests for instructions Nos. 1 and 2, and in failing to give the said instructions to the jury; (e) that the trial court erred in denying defendant's motion in arrest of judgment; and (f) that the trial court erred in denying appellants motion for a new trial.

For which errors, Sampson Tulee prays that the said judgment of the Supreme Court of the State of Washington, dated and entered April 2, 1941, in the above entitled cause, be reversed and that judgment entered in favor of the said Sampson Tulee, appellant, herein.

Dated June 30, 1941.

NATHAN R. MARGOLD,
Nathan R. Margold,
Solicitor of the United States
Department of the Interior,
Washington, D. C.

KENNETH R. L. SIMMONS,
Kenneth R. L. Simmons,
District Counsel,
Office of the Solicitor of the United States
Department of the Interior, Pratt Building,
Billings, Montana,
Counsel for Appellant.

76 Due, legal and personal service of the within and foregoing petition for appeal, assignment of errors and prayer for reversal and receipt of a true copy thereof is hereby acknowledged this 30th day of June 1941.

SMITH TROY,
Attorney General for the State of Washington.
T. H. LITTLE,
Assistant Attorney General for the State of Washington.
Counsel for appellee.

[File endorsement omitted.]

[Title omitted.]
[File endorsement omitted.]

Order allowing appeal

June 30, 1941

The appellant, Sampson Tulee, in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of Washington, on the 2nd day of April, 1941, and from each and every part thereof and having presented and filed his petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes of the United States and rules of the Supreme Court of the United States in such cases made and provided;

Now, therefore, it is ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Washington in the above entitled cause; and

It is further ordered that the Clerk of the Supreme Court of the State of Washington shall within 60 days from the date hereof make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true
79 copy of the material parts of the record, herein, which shall be designated by praecipe or stipulation of the parties or their counsel herein, pursuant to law and in conformity with the rules of the Supreme Court of the United States; and

It is further ordered that the filing of a bond as security for costs on appeal be and the same is hereby waived.

Dated this 30th day of June 1941.

JOHN S. ROBINSON,
Chief Justice of the Supreme Court of the State of Washington.

Due, legal and personal service of the within and foregoing order allowing appeal and receipt of a true copy thereof is hereby acknowledged this 30th day of June, 1941.

SMITH TROY,
Attorney General for the State of Washington,

T. H. LITTLE,
Assistant Attorney General for the State of Washington, Counsel for Appellee.

81 Supreme Court of the United States

[Title omitted.]

Certificate of Chief Justice of the Supreme Court of Washington re Federal questions

June 30, 1941

I, John S. Robinson, Chief Justice of the Supreme Court of the State of Washington, certify:

I

That a final judgment in the above entitled suit in the Supreme Court of the State of Washington, the highest court of the State of Washington in which a decision in the suit could be had, was made and entered in said Supreme Court of the State of Washington on April 2, 1941, on which date the judgment in the above entitled cause became final for purposes of appeal to and review by the Supreme Court of the United States.

II

That in said suit there is drawn in question the validity of a statute of the State of Washington, to wit: Section 5703, Remington's Revised Statutes of the State of Washington, on the ground of its being repugnant to the Yakima Treaty of June 9, 1855 (12 Stat. 951), between the United States and the Yakima Tribe of Indians, and to the Constitution of the United States and the decision of the Supreme Court of the State of Washington is in favor of its validity.

82 III

That said Sampson Tulee, appellant herein, duly and properly raised the following substantial Federal questions which were considered and passed upon by the Supreme Court of the State of Washington, and are available for review by the Supreme Court of the United States on appeal, to wit:

(A) That said statute is repugnant to and infringes upon the Yakima Treaty of June 9, 1855 (12 Stat. 951).

(B) That said statute is repugnant to and infringes upon the due process clause (Section 1) of the Fourteenth Amendment to the Constitution of the United States.

Dated at Olympia, Washington, this 30th day of June 1941.

JOHN S. ROBINSON,
Chief Justice of the Supreme Court of the State of Washington.

[Title endorsement omitted.]

146 [Citation in usual form showing service on Smith Troy, omitted in printing.]

152 Supreme Court of the United States

[Title omitted.]

Certificate of filing appeal papers

June 30, 1941

I, Benj. T. Hart, Clerk of the Supreme Court of the State of Washington, do hereby certify that the following papers were filed with me as such Clerk on June 30th, 1941, in the above entitled cause, to wit:

1. Petition for appeal to the Supreme Court of the United States, assignment of errors and prayer for reversal.
2. Jurisdictional statement.
3. Certificate of the Chief Justice of the Supreme Court of the State of Washington.
4. Order allowing appeal.
5. Praecipe.

Dated at Olympia, Washington, June 30th, 1941.

BENJ. T. HART,
Clerk of the Supreme Court of the State of Washington.

[File endorsement omitted.]

154 In the Supreme Court of Washington

[Title omitted.]

Praecipe for substitution of appearances

June 30, 1941

To the Clerk:

Please withdraw the name of Lyle Keith appearing as Assistant United States Attorney for the Eastern District of Washington

as one of the counsel for the appellant in the above entitled cause and substitute therefor Nathan R. Margold, Solicitor of the Department of the Interior.

Dated at Olympia, Washington, this 30th day of June 1941.

KENNETH R. L. SIMMONS,
of Counsel for Appellant.

Due and legal service of the foregoing Praecipe and receipt of a true copy thereof is acknowledged this 30th day of June 1941.

SMITH TROY,
Attorney General,
T. H. LITTLE,
Asst. Atty. Gen'l,
Counsel for Appellee.

[File endorsement omitted.]

155 : Supreme Court of the United States

[Title omitted.]

Praecipe for record

Filed June 30, 1941

To the Clerk of the Supreme Court
of the State of Washington,
Olympia, Washington:

You are hereby requested, within the time specified in an order dated June 30th, 1941 allowing an appeal herein, to make and transmit to the Supreme Court of the United States under your hand and the seal of the Supreme Court of the State of Washington, a true copy of the following material parts of the record herein, which shall compose the transcript of record herein, to wit:

1. The entire record in the Superior Court for Klickitat County and in the Supreme Court of the State of Washington.
2. Opinion and final judgment of the Supreme Court of the State of Washington, dated April 2, 1941.
3. Petition for appeal, assignment of errors and prayer for reversal, with acknowledgment of service.
4. Jurisdictional statement with acknowledgment of service.
5. Certificate of Chief Justice of Supreme Court of the State of Washington.
6. Order allowing appeal, with acknowledgment of service.

[File endorsement omitted.]

156 7. Citation with proof of service.
8. Praecipe with acknowledgment of service.
9. Statement directing appellee's attention to the provisions of paragraph 3 of rule 12 of the Revised Rules of the Supreme Court of the United States, with acknowledgment of service.
10. Statement of appellee in pursuance to paragraph 3 of rule 12 of the Revised Rules of the Supreme Court of the United States, with acknowledgment of service.
11. Certificate of filing appeal papers with the Clerk of the Supreme Court of the State of Washington, dated June 30th, 1941.

NATHAN R. MARGOLD,
Solicitor,
Department of the Interior,
KENNETH R. L. SIMMONS,
District Counsel,
Office of the Solicitor, Department of Interior,
Counsel for Appellant.

Due, legal and personal service of the within and foregoing praecipe and receipt of a true copy thereof is hereby acknowledged this 30th day of June, 1941.

SMITH TROY,
Attorney General for the State of Washington,
T. H. LITTLE,
Assistant Attorney General for the State of Washington,
Counsel for Appellee.

158 [Clerk's certificate to foregoing transcript omitted in printing.]

160 Supreme Court of the United States

[Title omitted.]

Stipulation re transmittal of original statement of facts

June 30, 1941

It is hereby stipulated by and between the parties hereto by and through their respective counsel that the original transcript of the testimony and the record taken at the trial of the above entitled cause in the Superior Court in and for Klickitat County, State of Washington, and all exhibits filed in the Supreme Court of the State of Washington in the said cause as a part of the record may be certified and transmitted by the Clerk of the

Supreme Court of the State of Washington to the Supreme Court of the United States, the same to be returned to the Clerk of the Supreme Court of the State of Washington following final disposition of said cause.

Signed and dated at Olympia, Washington, this 30th day of June 1941.

KENNETH R. L. SIMMONS,
of Counsel for Appellant,
SMITH TROY,
Attorney General,
T. H. LITTLE,
Ass't Att'y Gen'l.,
Counsel for Appellee.

Approved this 30th day of June 1941.

JOHN S. ROBINSON,
Chief Justice.

[File endorsement omitted.]

161 In the Superior Court of Klickitat County

[Title omitted.]

Statement of facts

Filed June 5, 1940

162 *Notice and service*

TO THE ABOVE NAMED PLAINTIFF, AND TO
MR. EDGAR H. CANFIELD AND MR.
T. H. LITTLE, IT'S ATTORNEYS:

You, and each of you, are hereby notified that the above named Defendant, Sampson Tulee, has prepared and filed with the clerk of the above entitled court a proposed statement of facts, a copy of which is herewith served upon you.

You are further notified that the said Defendant will, at the time said Statement of Facts is certified, ask the Court to order attached and made a part of said Statement of Facts all of the exhibits received or offered in evidence on the trial, or copies thereof.

Dated at Spokane, Washington, this 27th day of May 1940.

LYLE KEITH,
KENNETH R. L. SIMMONS,
Attorneys for Defendant.

Service of the above and foregoing Notice, and of the Statement of Facts thereto attached, by true copy thereof, is hereby acknowledged this 27 day of May 1940.

SMITH TROY,
Atty. Gen'l,
By T. H. LITTLE,
Ass't Atty. Gen'l.,
Attorneys for Plaintiff.
EDGAR H. CANFIELD,
Prosecuting Attorney.

163 In Superior Court of Klickitat County

[Title omitted.]

Date, May 10, 1940, 9 A. M.
At Goldendale, Washington.
Before Hon. J. E. Stone, Judge, and a Jury.

Appearances

For the Plaintiff, Mr. Edgar H. Canfield, Prosecuting Attorney for Klickitat County. Mr. T. H. Little, Assistant Attorney General.

For the Defendant: Mr. Sam M. Driver, U. S. District Attorney; Mr. Lyle Keith, Asst. U. S. Attorney; Mr. Kenneth R. L. Simmons, District Counsel, Dept. of Interior.

164 On this 10th day of May 1940 the above-entitled cause came on for hearing and for trial before the Honorable J. E. Stone, and a Jury duly empanelled and sworn to try the same. Plaintiff appearing by Mr. Edgar H. Canfield, duly elected and qualified prosecuting attorney in and for the County of Klickitat, and Mr. T. H. Little, Assistant Attorney General of the State of Washington, and defendant appearing in person and by Mr. Sam M. Driver, United States District Attorney for the Eastern District of Washington, Mr. Lyle Keith, Assistant District Attorney and Mr. Jenneth R. L. Simmons, District Counsel, Department of the Interior, and all parties having announced ready for trial, the following proceedings were had, testimony taken, and exhibits introduced.

Jury called, empanelled, and sworn.

Statement of Mr. Canfield

Mr. CANFIELD. Gentlemen of the Jury: This is a criminal action in which the state of Washington is plaintiff and Sampson

Tulee is defendant. The Prosecuting Attorney has accused Sampson Tulee of the illegal taking and sale of commercial food fish. The state will prove that on the 6th day of May 1939 Sampson Tulee was fishing at Spearfish; that on that day he caught certain salmon that are defined as food fish; that he had not previously acquired a license as he was required to do by the Statutes of the State of Washington; the defendant has entered a plea of Not Guilty to this charge, and, of course, that raises all issues, particularly the issue of catching fish, and the issue of whether or not he had a license. For all intents and purposes those are the only issues involved in this case.

165 DON S. JOHNSON, a witness called for and on behalf of the plaintiff, having been duly sworn, testified as follows on

Direct examination by Mr. CANFIELD:

Q. Your name is Don S. Johnson?

Mr. DRIVER. I would like to make a motion at this time; the defendant objects to any testimony on the part of the State in support of the amended information on the ground the amended information does not state a crime, and on the ground the information contains matter which, if true, would constitute a defense and a legal bar to the action.

Judge STONE. Motion denied.

Q. You are chief of the police patrol officers of the Department of Fisheries of the State of Washington?

A. Yes.

Q. How long have you been such chief patrol officer?

A. Since 1937.

Q. You were such patrol officer of the State Department of Fisheries on the 6th day of May 1939?

A. Yes.

Q. I will ask you whether or not Officer S. P. Phillips and John Turner were duly authorized fish inspectors of your department on the 6th day of May 1939?

A. That's right.

Q. They were authorized to enforce all the rules and regulations of the State Fisheries Department?

A. Yes.

Q. And all the laws of the State of Washington relative
166 to Fisheries and fishing?

A. Yes.

Mr. CANFIELD. That's all.

Mr. DRIVER. No questions.

S. P. PHILLIPS, a witness called and sworn, testified as follows on

Direct examination by Mr. CANFIELD:

Q. Your name is S. P. Phillips?
A. Yes.
Q. You are an inspector of the State Fisheries Department?
A. That's right.
Q. Will you tell the jury where you were on May 6th, 1939?
A. Over at Spearfish, Washington.
Q. Is that in this county?
A. Yes.
Q. Did you make an arrest on that day?
A. Yes, sir.
Q. Tell the jury whom you arrested on that day.
A. I arrested Mr. Sampson Tulee.
Q. For what offense did you arrest him?
A. Fishing without a license for salmon.
Q. Did you see Mr. Tulee in the act of fishing?
A. Yes, sir.
Q. At that time did you request to see his license?
A. Yes.
Q. Did he have a license?
A. No.
167 Q. Did you see Mr. Tulee in the act of selling fish?
A. Yes, sir.
Q. To whom was he selling the fish?
A. The Columbia River Packers Association at Spearfish.
Q. That sale then was made in Klickitat County, state of Washington?
A. Yes.
Q. You say you asked Mr. Tulee whether or not he had a license?
A. Yes.
Q. And he had none?
A. No; he didn't have any.

Cross examination by Mr. DRIVER:

Q. Where was it you saw him fishing; was it over on a little island back of the Packers buying station?
A. Yes.
Q. He was on a rock in the river at that time, was he not?
A. Yes; on kind of a platform.
Q. What was he using?
A. A dip net.
Q. That's a net on the end of a pole, is it?
A. Yes.
Q. And was the place where he was fishing here in Klickitat County?

A. Yes.

Q. You are sure that is in Klickitat County?

A. Yes; I am sure.

Q. How long have you been an inspector of the State
168 Department of Fisheries?

A. Twelve years.

Q. How long have you been familiar with that particular fishing site?

A. Oh, I have been up here for the past ten years.

Q. During all that time have the Indians fished there?

A. Yes, sir.

Q. It is opposite what is commonly known as Celilo Falls?

A. Yes.

Q. I presume, Mr. Phillips, as State Inspector, or inspector for the State Department of Fisheries you have to do quite a bit with Indians fishing along the Columbia?

A. I do at that time of year.

Q. Are you familiar with the provisions of the Act of 1855 that has provisions about Indians fishing at their old and usual and accustomed places off the reservation?

A. I believe there is something similar to that in the treaty.

Q. This spot so far as your department is concerned is a place recognized as one of those old fishing stations mentioned in the Yakima treaty?

A. I presume all along the Columbia River on the Reservation—off the reservation—I don't know about the Treaty.

Q. During, then, the time you have been familiar with it the Indians have fished at this same spot where Tulee was fishing?

A. Yes.

Q. This spot where he was fishing is commonly known and called Spearfish?

A. Yes.

169 Redirect examination by Mr. CANFIELD:

Q. Is Sampson Tulee in the Court room now?

A. Yes; that is Tulee [indicating].

Q. Down at the end of the table?

A. Yes.

Recross-examination by Mr. DRIVER:

Q. Was Sampson Tulee fishing for and catching salmon?

A. Yes.

Q. Is that what he actually sold—salmon?

A. Yes, sir.

Witness excused.

JOHN TURNER, a witness called for and on behalf of the Plaintiff, having been duly sworn, testified as follows on

Direct examination by Mr. CANFIELD:

Q. Your name is John Turner?
A. Yes, sir.
Q. You are a fish inspector for the State Department of Fisheries?
A. Yes, sir.
Q. How long have you been such inspector?
A. Ten years.
Q. Where were you on the 6th day of May 1939?
A. Down at Spearfish.
Q. On that day you were acting as inspector of the State Department of Fisheries?
A. Yes.
Q. Did you make an arrest on that day?
A. Yes.
Q. Whom did you arrest?
170 A. Mr. Sampson Tulee.
Q. Is he in the courtroom at this time?
A. Yes; the gentleman at the end of the table.
Q. At that time what was Mr. Tulee doing?
A. He was fishing.
Q. How was he fishing?
A. With a dip bag net.
Q. In the Columbia River, was he?
A. Yes, sir.
Q. The place he was fishing was a place off the reservation, was it?
A. Yes, sir.
Q. You know that of your own knowledge, do you?
A. Yes.
Q. Did you see Mr. Tulee catch any fish?
A. Yes.
Q. What kind of fish did he catch?
A. Salmon.
Q. Did you ask him if he had a license at that time?
A. I did.
Q. What did he answer?
A. "No."
Q. Did you see Mr. Tulee in the act of selling fish on that day?
A. Yes.
Q. Where did he sell the fish?
A. To the Columbia River Packers buying station.

Q. Where?
A. Right straight up the river from where he was fishing.
Q. What kind of fish was he selling?
A. Chinook Salmon.

Q. Do you know the requirements that are made of
171 these fish buyers in regard to making reports?
A. Yes.
Q. Tell the jury what the requirements are.
A. They have a buyer's report book, and a triplicate—duplicate in the book. When they buy fish from a fisherman they have to put down his name and the poundage, how many pounds they bought on every day—they have to keep a daily record of it and every day tear out one sheet and send to our department, and one sheet goes to the Cannery.
Mr. CANFIELD. That's all.

Cross-examination by Mr. DRIVER:

Q. How long have you been an inspector for the State Fisheries Department?
A. Ten years.
Q. During all of that time have you been familiar with this place where Sampson Tulee was fishing?
A. I have been there every year for ten years.
Q. Known as Spearfish?
A. Yes.
Q. During the ten years you have been acquainted with this place have the Yakima Indians fished there each season?
A. Yes; I think they have.
Q. The place where he was fishing was in Klickitat County?
A. Yes, sir.
Witness excused.

WILLIAM YALLUP, a witness called for and on behalf of the State, having been first duly sworn thru the Interpreter, Thomas Yallup, testified as follows:

THOMAS YALLUP, having been sworn to act as interpreter as follows:

172 INTERPRETER'S OATH AS GIVEN TO THOMAS YALLUP

"You do solemnly swear that you will well and truly present to the witnesses any and all questions propounded by the Court or Counsel, and that you will well and truly interpret their answers to the same into the English language, So Help You, God."

Direct examination by Mr. CANFIELD:

Q. What is your name?

A. William Yallup.

Q. What is your age?

A. 74.

Q. Are you a member of the Yakima Indian Tribe?

A. Yes.

Q. Are you familiar with the fishing grounds at Spearfish?

A. Yes.

Q. Did your father before you use the fishing grounds at Spearfish?

A. Yes; a long time before my time when he started fishing there.

Q. Do you know if your father used the fishing ground at Spearfish in 1855, at the time the Treaty with Governor Stevens was signed?

A. Yes; he had been fishing it before that treaty was agreed on at Wala Wala—so did his father.

Q. Do you know whether or not the fishing grounds at Spearfish were the ancient and accustomed fishing places as defined in this treaty of 1855?

A. Yes; it was the ancient accustomed fishing place, from time immemorial the Indians have fished there.

Cross-examination by Mr. SIMMONS:

Q. How old are you?

A. 74.

173 Q. What is your father's name?

A. Thampa.

Q. When did your father die?

A. Over fifty years ago.

Q. Do you know the age of your father approximately at the time of his death?

A. My father was pretty well along in years when he died.

Q. Was he over seventy years old?

A. I think he was seventy five years old when he died.

Q. Do you remember your father as a small boy? Is your memory good now so that you remember your father when you were a small boy?

A. As far as I can remember when I was a boy my father had fished along the river and one of the places was down at Spearfish.

Q. I didn't ask that at all. I will withdraw that question. How did your father support you and the family?

A. My father raised me with the game, the deer, and the game birds and different kinds of fish, and mother she helped—she went out and gathered roots, berries, and different kinds of roots.

Q. Did your father at any time tell you that he had caught salmon at Spearfish, the place set out in the amended information before June 9, 1855, and at the time of and after June 9, 1855, the date of the treaty between Yakima Indians and the United States?

A. Yes; he had fished before the treaty, and also after the treaty had been agreed on.

Q. And he had told you that he had fished at Spearfish, the place set out in the amended information—he told you he had fished at Spearfish, the place designated in the amended information?

174 A. Yes; my father used to come back with a lot of fish; fish he caught at Spearfish.

Q. Did your father explain at any time the method he used in trading this fish with the white settlers in the territory?

Mr. CANFIELD. I object to that—those points are not in issue.

Mr. SIMMONS. I am merely trying to prove this is one of the old and accustomed fishing stations—in fact, I am trying to make out the state's case. There has been no evidence, competent at least, before this time that this defendant was fishing at an old and accustomed fishing station, according to the Yakima treaty. I am trying to get some evidence in there was commercial fishing at Spearfish.

Judge STONE. I will permit the answer.

(Question read:) "Did your father explain at any time the method he used in trading this fish with the white settlers in the territory?"

A. Yes; my father said when the white settlers first came they went to the Indians where the Indians were fishing and the salmon was running, and then they traded them vegetables and even clothing, and later on traded money for the fresh salmon.

Witness excused.

175 JOBE CHARLEY, a witness called and sworn, testified by and thru Interpreter, Thomas Yallup.

Direct examination by Mr. CANFIELD:

Q. What is your name?

A. Jobe Charley.

Q. How old are you?

A. I am eighty years old.

Q. Are you a member of the Yakima Indian Tribe?

A. Yes. I am a member of the Yakima Tribe, and I was born at Spearfish.

Q. Do you know whether or not Spearfish in this county and on the Columbia River as set out in the amended information, is the usual and accustomed fishing place used by the Yakima tribe before, on and after June 9, 1855, the date of the treaty?

A. The name of this accustomed rock is Nannyx, and that has been fished by the Indians long before the treaty, and also after the treaty had been signed.

Q. That is the location known as Spearfish now, is it?

A. Yes.

Q. Is the Indian name Nannyx the same as the English name Spearfish—are they the same place?

A. That Spearfish is just the name that has just been given the station a few years ago.

Witness excused.

SAM POYET, a witness called and sworn, testified as follows (thru interpreter):

Direct examination by Mr. CANFIELD:

Q. What is your name and age?

A. Sam Poyet, and my age is seventy eight years old.

176 Q. Are you a member of the Yakima tribe of Indians?

A. I was born and raised along the river, then I went in and was allotted in the Yakima Reservation.

Q. Are you acquainted with and know about the fishing location at Spearfish?

A. I know of a rock which is Nannyx.

Q. Is Nannyx the same location as is now known by the name of Spearfish?

A. White man must have given that location the white man's name, and I don't know anything about it.

Q. Is it the same place?

A. As I said before I don't know this Spearfish, but I know it is Nannyx.

Q. Do you know the place where Sampson Tulee was arrested for fishing without a license?

A. I know where he was arrested and that location is the rock; the name of it is Nannyx.

Q. Is this location where Sampson Tulee was arrested, that is, the location set out in the amended complaint or information, is one of the usual and accustomed fishing places used by the Yakima tribe before and after June 9, 1855, when the Treaty was signed?

A. Whenever this world was created, from the time of the beginning the Indians have fished there.

Cross-examination by Mr. DRIVER:

Q. Was it the custom of the Indians to dry the fish they caught in the Columbia and powder them and use them for winter supplies?

A. It had been the custom of the Indians to dry the
177 fish and this powdered salmon, and there was another way of fixing that powdered salmon—they used salmon oil, and some of them dried lots of salmon and the Indians that wasn't fishing could come and trade, exchange different kinds of roots and berries for the fish.

Q. Did they also trade the powdered fish with the whites after the white men came?

A. No.

Q. I wonder if the witness understood my question. He testified the powdered fish was traded with the other Indians—did they also trade with the white people?

A. No——

Q. Did they trade fresh fish?

A. The dried fish the white people didn't want that powdered salmon, but they wanted fresh salmon.

Q. Did they trade fresh salmon with the whites?

A. The white man traded for the fresh salmon.

Mr. SIMMONS. May it please the Court, at this time I would like to have the record show that a certain stipulation has been entered into between the State of Washington and the defendant Sampson Tulee, and I would like to dictate it into the record:

Stipulation as to certain facts

It is stipulated and agreed by and between the State of Washington, plaintiff, and Sampson Tulee, defendant, thru their counsel of record in open court this 10th day of May 1940, that Spearfish, the location set out in the amended information on file in the action wherein the State of Washington is plaintiff against Sampson Tulee, defendant, cause No. C–672, was the usual and accustomed fishing place used by the members of the Yakima tribe of Indians to catch salmon and other fish before, on and after
178 June 9, 1855, continuously to the present time, as defined in the Yakima Treaty of June 9, 1855 (12 St. 951).

Let the record show that was agreed to by the plaintiff and defendant thru their attorneys.

Mr. CANFIELD. May the record show it is stipulated between the plaintiff, State of Washington, and the defendant, Sampson Tulee, that the Columbia River Packers Association, Inc., on May 6, 1939, purchased 413 pounds of salmon from Sampson Tulee, the

defendant in this case, the same being delivered to the packers and received by them at Spearfish, Klickitat County, Washington.

Mr. DRIVER. We agree to that.

Mr. CANFIELD. The State rests, your Honor.

Mr. DRIVER. I wish to make a motion.

Judge STONE. Very well.

Motion to dismiss, etc., and order denying same

Mr. DRIVER. The State having rested, the defendant moves that this action be dismissed or, in the alternative, that the Court instruct the Jury to return a verdict of "Not Guilty" on the ground and for the reason that the evidence adduced by the State is not sufficient to warrant or sustain a verdict of Guilty, and, also, because the evidence adduced by the state sets up and establishes matter which would be a legal bar and defense to the action.

Judge STONE. The Motions will be denied.

Mr. DRIVER. If the Court please, at this time I wish to file with the clerk some requested instructions for the defendant, and would like the clerk's records to show that copies were served upon the state.

Judge STONE. I assume these two should remain in the Court's file. Do you desire to have them marked "proposed 1" and "proposed 2"?

178 Mr. DRIVER. If the Court please, I offer in evidence Defendant's Exhibit No. 1, a certified photostatic copy of the minutes and proceedings and negotiations between Governor Stevens and the Yakima tribe of Indians preceding the signing of the Yakima Treaty of 1855.

Mr. CANFIELD. No objection.

Mr. DRIVER. In view of the fact that Exhibit 1 is a photostatic copy of the original which is in longhand and most difficult to read, I offer as Exhibit No. 2 a typed copy of Exhibit 1.

Mr. CANFIELD. No objection.

Judge STONE. Both exhibits will be received.

Whereupon the Court read his instructions to the Jury as follows:

Instructions to the Jury

Members of the Jury:

This is a criminal action, in which the State of Washington is plaintiff and Sampson Tulee is defendant. The State, by the Prosecuting Attorney, has charged the defendant with the crime of

ILLEGAL SALE AND TAKING OF COMMERCIAL FOOD FISH

That on or about the 6th day of May 1939, and within the last year immediately preceding the filing of this Amended Information, at Spearfish on the Columbia River in Klickitat County, Washington, the above-named Sampson Tulee, a member of the Yakima Indian Tribe, then and there being, did then and there catch, at one of the usual and accustomed ancient fishing places of said Yakima Tribe of Indians as defined in the Yakima Indian Treaty of June 9, 1855 (12 St. 951), and off the Reservation of said Indians, certain food fish, to wit: salmon; and did then and
180 there sell the same commercially without first having obtained a license for the taking thereof as required by section 5703, Remington Revised Statutes of Washington.

Instruction No. 2

To this Information the defendant has interposed a plea of not guilty thus raising every issue in this case and making it necessary for the State to prove to your satisfaction beyond a reasonable doubt every material element of the crime with which the accused stands charged.

Instruction No. 3

You are instructed that the laws of the state of Washington provide that every person, firm, or corporation using a dip bag net for the taking of salmon in the Columbia River shall pay therefor a license of five dollars per year.

Instruction No. 4

You are instructed that under the laws of the state of Washington the state has a right to regulate the taking of fish within its boundaries and on streams not included in or bordering upon the Yakima Indian Reservation; and that the defendant, Sampson Tulee, is as much subject to this right of state regulation as if he were not a member of the Yakima tribe when he is fishing on any stream not within or bordering upon said Indian Reservation.

Instruction No. 5

If it has appeared to you that the Court during the trial or in the giving of these instructions has commented on the evidence or indicated in any manner its opinion of the weight or convincing effect of any of the testimony you shall disregard such com-
181 ment entirely, for it is the jury and not the Court which must decide the issues of fact in this case.

Instruction No. 6

The Jury is further instructed that the doubt which entitles the defendant to an acquittal must be a doubt for which a reason exists. You are not to go beyond the evidence to hunt up doubts, nor must you entertain such doubts as are merely vague, imaginary, or conjectural. A reasonable doubt is such a doubt as exists in the mind of a reasonable man after he has fully, fairly, and carefully compared and considered all the evidence or lack of evidence introduced on the trial. If, after a careful consideration and comparison of all the evidence you can say you have an abiding conviction of the truth of the charge you are satisfied beyond a reasonable doubt.

Instruction No. 7

You are the sole judges of the evidence in this case of the credibility of the witnesses and of the weight to be accorded to the evidence received.

In considering the credibility of any witness and the weight to be given to his testimony you should take into consideration his appearance and demeanor upon the stand, his manner of testifying, his apparent candor and frankness or bias, if either be shown, his means of knowledge or observation of the matters concerning which he has testified, the probability or improbability of the story which he relates, and his interest, if any, in the event of this action.

Instruction No. 8

A person accused of crime is presumed to be innocent. This presumption is not a matter of form merely which the jury may disregard at pleasure, but continues thruout the trial
182 until the same shall have been removed or overcome by proof of guilt beyond a reasonable doubt.

Instruction No. 9

These instructions are given by the Court as a whole and are so to be considered by the jury. Each and every instru'tion is to be considered in connection with all of the other instructions given.

Instruction No. 10

While you have nothing to do with the penalty to be imposed in case you find the defendant guilty you are informed in order to prevent any effect of misconception that the punishment to be imposed in case of conviction is a fine of not less than $250,

nor more than $1,000, or imprisonment in the county jail for not less than 30 days nor more than six months, or by both fine and imprisonment.

Instruction No. 11

If you find that the state has proved to you beyond a reasonable doubt all the elements of instruction No. 1 you will find the defendant guilty of illegal taking of game fish; to wit, salmon; on the other hand, if you find that the state has failed to prove all the elements beyond reasonable doubt you will find the defendant not guilty.

Instruction No. 12

In conclusion let me remind you that each of you have taken a solemn oath that you will well and truly try this case, and a true verdict render upon the evidence on the trial and upon the law as now given you by the Court.

You have nothing whatever to do with the punishment to be inflected in case of a violation of the law. The fact that punishment may follow a conviction cannot be considered
183 by you except insofar and only so far as it may tend to make you careful.

Neither must you allow yourself to be moved in the least by sympathy or influenced by prejudice. The question of guilt or innocence is a question of fact and not a question of prejudice or what the punishment shall be. If, as a matter of fact, from the evidence the defendant is guilty no amount of sympathy will make him innocent. If he is innocent no amount of prejudice will make him guilty. For, regardless of what the penalty may be, regardless of any feeling of sympathy or prejudice, the defendant is upon the evidence, and the evidence alone, either guilty or not guilty. What is the true verdict as shown by the evidence is the one question before you.

Instruction No.—

This being a criminal case it will require your entire number of 12 to return a verdict. When you have retired to your jury room you will select one of your number to act as foreman, whose duty it will be to sign whatever verdict you agree upon.

You will take to the jury room the exhibits which have been admitted in evidence, these instructions, and two forms of verdict. One form of verdict you will use in case you find the defendant Guilty; the other form you will use in case you find the defendant Not Guilty.

(Signed) J. E. STONE, *Judge*.

184 *Defendant's exceptions to instructions*

Mr. SIMMONS. If the Court please, the Jury having withdrawn, the defendant Sampson Tulee, now objects to the Court giving Instruction No. 4 for the following reasons:

1. There is no jurisdiction in this Court nor in the State of Washington over the fishing activities of the Yakima Indians and, in particular, over this defendant, Sampson Tulee, a member of the Yakima tribe of Indians when fishing at Spearfish, the usual and accustomed fishing place as defined by the Yakima Treaty of June 9, 1855 (12 Stat. 951):

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as, also, the right of taking fish at all usual and accustomed places in common with the citizens of the territory, and of erecting temporary buildings for curing them."

2. That said Statute, namely Section 5703, Remington's Revised Statutes of the State of Washington, upon which said amended information is based is unconstitutional and void insofar as it attempts to regulate, control, or restrict fishing at Spearfish, Washington, the location set forth in the amended complaint on file herein by the defendant, Sampson Tulee, a member of the Yakima tribe of Indians.

3. By paragraph 2 of Article III of the Treaty of June 9, 1855 (12 Stat. 951) there is allotted to members of the Yakima tribe of Indians and to this defendant, Sampson Tulee as
185 a member of the Yakima Tribe of Indians the perpetual right to take fish in all the streams bordering upon or running through said Reservation as well as at all usual and accustomed places, including Spearfish, Washington, without interference by the State of Washington, or otherwise.

4. The fishing activities of the Yakima Indians at their usual and accustomed fishing places as defined by the treaty of June 9, 1955, which would include Spearfish, Washington, the location named in the amended information on file herein, are exclusively under Federal jurisdiction and not the jurisdiction of the State of Washington.

Defendant excepts to the failure of the Court to give Defendant's proposed instruction No. 1 for the reason that it affirmatively appears from the evidence of the plaintiff, state of Washington, that Sampson Tulee caught and sold salmon at Spearfish, Washington, which was the usual and accustomed fishing place on the Columbia River of the Yakima tribe of Indians as defined in the Yakima Indian treaty of June 9, 1855; that Sampson Tulee was not subject in fishing at said place to the regulatory

laws of the State of Washington, and the verdict, therefore, should have been directed in favor of the defendant.

2. The defendant excepts to the failure of the Court to give defendant's proposed Instruction No. 2 for the identical reasons given and set forth in support of the defendant's exception to the giving by the Court of its instruction No. 4.

After a verdict of Guilty had been returned by the Jury, and after sentence having been pronounced upon the Defendant by the court,

186 *Notice of appeal*

Mr. DRIVER. We appreciate the leniency of the Court, and the defendant at this time gives oral notice of appeal in open court to the Supreme Court of the State of Washington from the judgment and sentence rendered by this Court.

Judge STONE. The clerk will note the giving of notice to appeal in open court.

187 [Reporter's certificate to foregoing transcript omitted in printing.]

188 In Superior Court of Klickitat County

Judge's certificate to statement of facts

I, J. E. Stone, Judge of the Superior Court of the State of Washington, in and for Klickitat County, and the Judge before whom the above entitled action was tried, do hereby certify:

That the matters and proceedings embodied in the foregoing Statement of Facts are matters and proceedings occurring in said cause and the same are hereby made a part of the record therein.

That the above and foregoing Statement of Facts contains all the material facts, matters, and proceedings heretofore occurring in said cause and not already a part of the record therein, and contains all the evidence, oral and in writing, therein.

That the above and foregoing Statement of Facts was duly and regularly filed with the clerk of said court and thereafter duly and regularly served within the time authorized by law.

That no amendments were proposed to said Statement of Facts excepting such as are embodied therein.

That due and regular notice of application to the Court for settlement and certification of said Statements of Facts was made and served upon the plaintiff, which notice specified the place and time (not less than three days or more than ten days after

the service of said notice) to settle and certify said statement of facts.

That the exhibits referred to in said Statement of Facts are directed to be, and hereby are, made a part of said Statement of Facts.

Dated this 5 day of June 1940.

J. E. STONE, *Judge.*

190 *Defendant's Exhibit 2*

[Copy]

COUNCIL GROUND, CAMP STEVENS,
Walla Walla Valley, W. T., June 14, 1855.

Hon. GEO. W. MANYPENNY,
Commissioner of Indian Affairs, Washington, D. C.

SIR: I have the honor herewith to inclose a Treaty which I concluded on Saturday June 9th with the Tribes constituting the Yakama Nation and a copy of the official proceedings duly certified to by the Secretary.

By the Treaty sixteen thousand nine hundred and twenty square miles of Territory have been ceded to the United States, and one thousand two hundred and thirty-three square miles held in the two reservations provided for in the Treaty. The population of the Nation is estimated at Two thousand souls as per following table, though it is believed that careful census will show a larger number. ——— ——— run up to nearly Twenty-five hundred.

ESTIMATED POPULATION OF THE YAKAMA NATION

	Estimate
Pischouse	254
Yakamas	500
Palouses	500
	Actually enumerated
Band opposite to and above mouth of John Day's river	60
Band opposite to John Day's river	100
Band opposite to Dalles	370
Band opposite to DesChutes river	120
Clikatats on Clikatat river	60
Band on White Salmon river	36
Total population	2,000

The report of the Superintendents of Washington and Oregon in relation to the joint Treaties with the Nes Perses, Walla Wallas, Cayuses, and Umatillas, referred to the fact that the Tribes of the Yakama Nation were brought into the same council with them; and that the final arrangements were made in a separate and special council. It is a questionable matter whether the Tribes could all have been consolidated in a council held in their own country, and

though the negotiations were protracted the presence of the principal chiefs of the Nation and especially the great authority of Kam-ai-a-kun, the Head Chief, exerted a powerful influence in promoting the general result. The concurrence of the several tribes in establishing the Nation is universal, and in effecting treaties hereafter, every effort will be made to incorporate with the Nation on the same reservation, the OaKinakanes and perhaps the Colvilles on the north and the bands of the Columbia river between those on the White Salmon and Cowlitz rivers, numbering in all some twelve hundred souls.

The large reserve selected is in every respect adapted to an Indian reservation. It is separated from a fine region of country on the Columbia river by a series of divides extending from the Yakima River to the Cascades. It is off from the waggon route to the Sound over the Cascades—It backs up against the Cascades, affording a fine range for roots, berries, and game. It has almost inexhaustible Salmon fisheries. The reserve furnishes excellent land for farms, abundance of pine for buildings, good sites for mills, and large ranges for horses and cattle through the entire year,

191 For further details in regard to this Treaty and the proceedings in effecting it, I will respectfully refer you to the Treaty itself, the enclosed copy of the official proceedings, and the copy of the proceedings of the joint council transmitted with the joint report of the Washington and Oregon Superintendents.

I have assigned sub-agent A. J. Bolon to the charge of the Indian parties to this Treaty. No objections were made to him by the chief of the Yakama Nation and by the missionaries. Father Pendosy of the Yakama Mission was present by invitation at the council. The charges against Mr. Bolon may be regarded as abandoned. I have to report that Mr. Bolon has shown a most commendable spirit in the discharge of his duties and that he is a faithful and efficient agent.

A map of the country ceded and of the reservation accompanies this report.

I am, Sir, very respectfully your most obedient.

(Sgd) Isaac I. Stevens,
Gov. & Supt., W. T.

I. I. Stevens, Gov. & Supt. June 14, 1855. Enclosing Treaty with Yakima Indians concluded June 9, '55, with the Yakimas. estimate of numbers confederation of Oakinakanes & Colvilles. Description of recent charges against Mr. Bolon sub-agent, considered abandoned. Map of country ceded & the reservations enclosed. Recd. August 27, '55. Ackd. Sept. 3, '55. Rept. to Secy. Int. July 9, '56.

192 Official Proceedings at the Council, held at the Council Ground in the Walla Walla Valley with the Yakama Nation of Indians, and which resulted in the conclusion of a Treaty on the 9th day of June 1855.

May 28th, 1855

A' 11 a. m. Kamaiakun, Owhi, & Skloom, Yakama Chiefs came to the Council Ground; they had been greatly delayed on the road by continued heavy rains and consequent high water in the streams. But few of their people accompanied them as it is the season for digging Roots and catching Salmon. The Yakamas were also accompanied by Delegates from the Pahawnwappam, Pisquose, Wenatshappam, and Palouse Indians, all Tribes or Bands acknowledging Kanmikun as their Head Chief, and there were present Representatives from the Bands living on the Columbia River down to the White Salmon River.

Gov. Stevens addressed them briefly, welcoming them; offering them provisions as his friends and guests; and inviting them to meet tomorrow in Council at this place and hear what the Commissioners wished to say to all the Indians in this Country.

The next day the 29th the Yakama Chiefs attended at the Council, and listened to an explanation of the objects had in view by the Government in proposing to Treat with them. They continued to attend from day to day and Gov. Stevens stated to them fully the terms of the Treaty he proposed to conclude with them; the amount to be paid for their lands and the manner of payment; the Extent of the Reservation to be set apart for them and that upon the Reservation he wished to place the Yakamas, the Colvilles, the Pisquose, & Oakinakanes and the Bands on the Columbia River below the Mouth of the Umatilla as low down as the mouth of the Cowlitz River; The Yakama Chiefs made no reply to these propositions until the 8th day of June when upon the request of Gov. Stevens that he would speak his mind, Kamaiakun spoke briefly saying, in effect, that many of his people had left their country, some gone to the Caloopooyer Country, some to Nisqually and some to the Taih. He wished the Americans to settle in his country on the Waggon Road. He spoke for his people not for himself alone. He wished no Goods for himself. He was tired talking and waiting here and wished to get back to his Garden.

Skloom and Owhi spoke but only in a general manner, and the Council adjourned, it being understood that the Yakama Chiefs had determined to return home the next day.

In the evening Gov. Stevens had a lengthy interview with Skloom which did not result in anything conclusive: but in the

morning, June 9th, at an early hour Kamaiakun visited Gov. Stevens and announced his determination to return home that day; Gov. Stevens endeavored to convince him that it was better to reflect well upon the course he, the Head Chief of his Nation, was about to pursue; whether it would result in good or Evil to his people and advised him to remain until the conclusion of the Council with the Nes Perces and others, and try to make up his mind to a Treaty which would certainly be beneficial to his people.

Kamaikun said he was tired of hearing so much talking; he himself did not wish to talk; Why did not Owhi and Skloom speak? He Kamaikun did not wish to be Head Chief, but, since they all said he must talk; must be the Chief; well, let it be so; He would now speak: He would make the Treaty proposed; he liked the Reservation and wished to collect there all his people; they were much scattered, as he had before said, and he desired to have them sent home. He then gave a statement of the Indian Tribes and Bands who considered him their head Chief, viz: The Yakamas proper, the Palouse, Pisquose, Okinakanes and Methows, the Pshawnwappam and all the Bands on the Columbia River below the Umatilla as far as the White Salmon River and these he would undertake to govern; He was satisfied with the Reservation in his country, but desired a small piece of land at the place called Wenatshapam—where the Indians take many fish—for the Pisquouse & Methows. He wished the papers written so that
193 he might sign them today and go home. This was all.

During the interview several Head men of the Palouse, Pisquouse, & Methows were present and unanimously assented to Kamaikun's decision.

Kamaikun was present at the General Council during the day but did not speak; and in the evening immediately after the adjournment of the Council, he called upon Gov. Stevens for the Treaty and signed it; Owhi and Skloom did the same, as also the Palouse Chief Kahlatoose, and all the Chiefs present, named by Kamaiakun as being under his jurisdiction. Several Chiefs of the Bands at Dalles and above, who were in attendance during the first days of the Council, had returned home to catch their usual supply of Salmon, these, Kamaiakun said, as also all that he had named would sign the Treaty whenever it was presented to them if Gov. Stevens thought it necessary.

The Treaty was then duly witnessed and the Council with the Yakamas declared adjourned sine dei.

On Monday the 11th. The goods, presents for the Yakamas were portioned out and Kamaikun although he would not take any goods for himself superintended the division among his people.

Kamaikun said he had never taken goods from the whites as presents; he did not wish them now but when the Treaty was

pronounced good by the President then he would live on the Yakama Reservation and accept his share of the annuities and other payments.

The Chiefs were entertained at Gov. Stevens Table and throughout their stay here appeared to have the most friendly feelings towards the whites.

Towards evening, Kamaikun, Owhi, and Skloom and their people started on their return to the Yakama Valley.

I hereby certify the above to be a true record of the proceedings at the Yakama Council.

(Sgd:) JAMES DOTY,
Secty. Treaties, W. T.

Approved and for further detail, see record of the Joint Treaty Official Proceedings.

(Sgd.) ISAAC I. STEVENS,
Gov. & Supt. Ind. Affairs, Washington Terrty.

194 COUNCIL GROUNDS, CAMP STEVENS,
Walla Walla Valley, June 13th, 1855.

Hon. GEO. W. MANYPENNY,
Commissioner Indian Affairs, Washington, D. C.

SIR: We as joint commissioners have made treaties with the tribes common to the two Territories of Washington and Oregon, of which we are respectively the Superintendents, and herewith have the honor to enclose the Treaties and the record of the official proceedings.

The tribes with whom treaties have thus been made, are the Nes Perses, Walla Wallas, Cayuses, and Umatillas, of whom 2,650 are estimated to be in Washington Territory and 1,350 in Oregon as per following table.

	Washington	*Oregon*
Nes Perses	1,950	550
Walla Wallas	550	250
Cayuses	150	350
Umatillas	--	200
	2,650	1,350

The lands ceded by these Tribes are as follows:

	Washington, sq. miles	*Oregon, sq. miles*	*Total sq. miles*
Nes Perses	12,320	11,818	24,138
Walla Walla, Cayuses, & Umatillas	2,908	3,362	6,270
Total	15,228	15,180	30,408

The Indians have been placed on two Reservations. The Nes Perses in their own country and mostly in the Territory of

Washington and the remaining Tribes on a single Reservation in Oregon. Separate Treaties have accordingly been made with the Nes Perses, and with the confederated tribes and bands of the Walla Wallas, Cayuses, and Umatillas.

The reserves of these two Treaties are as follows:

Nes Perses	5,122
Walla Wallas, Cayuses, & Umatillas	800°
Total estimate of country included in reservations	5,922

All the above numbers and estimates may be corrected hereafter, in taking a census of the Indians in their own country, and locating and surveying the reservations. The census of the Nes Perses has been furnished by the chiefs of the several bands. They have 2,133 persons at home, 1,670 in Washington and 463 in Oregon, and they estimate 300 to 500 at Buffalo. (We have assumed 357 at Buffalo.) 87 from Oregon and 280 from Washington. The Census will be taken by Looking Glass on his return thither.

The reservations may seem to be large, especially that of the Nes Perses tribe.

All these tribes own large bands of horses and cattle and have small farms.

The Nes Perses country is well described by Lawyer in his speech in council as poor and barren, and with the provision that other tribes not exceeding the aggregate number of the Spokanes, Walla Wallas, Cayuses, and Umatillas may be placed upon the reservation, it is not believed it can be objected to. The Nes Perses own some 15,000 horses and cattle and the Cayuses, Walla Wallas, and Umatillas some 20,000.

The Cayuse reservation is decidedly limited and is simply adequate to their wants.

195 The initial proceedings in collecting the Indians were taken by the Superintendent of Washington Territory who in January despatched Mr. Doty to the Indian Territory who purpose. On learning from Mr. Doty that there was a probability that treaties could be effected the Superintendent of Oregon was invited to join in the operations as a joint commissioner and at a meeting at Vancouver on the 4th April the arrangements were made for their joint action and on the 7th of April the 20th day of May was fixed upon for opening the Council. Instructions were given accordingly to the proper Indian officers.

A copy of the official journal of the Superintendent of Washington will give somewhere in detail the operations of Mr. Doty the Sec'ty of the Washington Superintendent in establishing the camp for the Treaty and in collecting the Indians. The information has already been partially communicated officially to the

department. The Supt. of Oregon despatched Agent Thompson to the Indian country, who also gave notice to the chiefs of the Walla Wallas, Cayuses, and Umatillas and conferred with Mr. Doty on the Council ground.

In the general operations of the commissioners the Indians of the Yakama Nation and those of Oregon below the Umatillas were also assembled at the Council Ground to embrace the largest possible field, and to promote the great ends of peace and friendship between the different tribes, the Supt. of Washington deemed it best to commence the negotiations with the Yakamas in open council with the Tribes common to the two Territories to which arrangement the Sup't of Oregon assented. They were consummated in a separate and special council.

The commissioners deemed it their duty on reaching the Dalles to make a requisition on Major Hains to despatch a military force to the Council ground. A copy of their letter to him is herewith enclosed, which sets forth the reasons for their action. It is due to Pee-opee-mox-a-mox the Walla Walla Cheif to state that on receiving from Mr. Doty information of the turbulent conduct of five young men of the Cayuse Tribe and a request that he as the only real cheif in the valley should restrain them, he executed his authority immediately, and no further trouble was given by them. These five young men had previously much annoyed the settlers, entering their houses in a threatening manner, breaking down their enclosures and indicating a bad spirit.

The Commissioners reached the Treaty Ground on the 21st May, the Nes Perses on the 23rd May, the Cayuses on the 25th, the Walla Wallas and the Yakamas on the 27th and the council was opened on the 29th of May.

At the time of opening the council the Cayuses, Walla Wallas, and Yakamas refused both tobacco and provisions as did the Salmon band of the Nes Perses tribe.

The official journal will show the peculiar phases of the negotiations, and the complete concurrence of all the Indians in the arrangements finally agreed upon.

Looking Glass a prominent Nes Perses cheif reached the council ground on the 9th of May, seven days from the St. Marys Valley, and on Saturday endeavored by a bold stroke to depose Lawyer the Head Cheif, assume authority in his stead and dictate other terms. The council was adjourned, the Tribe refused to recognize his authority and on yesterday Looking Glass signed the Treaty next to the Head Cheif entirely satisfied with the terms. The Cayuses whom the unexpected course of Looking Glass had encouraged to resisting their positive agreement with equal cheerfulness signed the Treaty.

Thus has ended a most difficult and protracted negotiation. The council ground was in the Cayuse country near the place consecrated by the blood of the missionary Dr. Whitman and his family who were killed in 1847 by the Indians of the Cayuse tribe.

196 Its effects on the peace of the country hardly admits of exaggeration. Had no Treaty been effected there would probably have been blood shed and open war the present year. Its effect upon the Snakes will be great and it will have a large expenditure in consequence, in the military operation of the present year to chastise that tribe for its atrosities last season.

The official proceedings will show the effects made to place all the Indians of the joint Treaties on one reservation. To effect treaties the com'issioners had no alternative then to agree to two Reservations. It was deemed due both to the Indians and settlers that the provision for a waggon road should be inserted in the joint treaty providing for a reservation in Oregon.

The official journal is so full that no further elaboration of the matter seems called for in this communication, a map is enclosed showing the country ceded and the lands reserved.

In regard to administration, the commissioners are of opinion that from the present time it would be impolitic to have the Indians of the same Tribe under two jurisdictions, accordingly we have made arrangements from this time that the Nes Perses shall be under the jurisdiction of the Sup't of Washington and the Walla Wallas, Cayuses under that of the Sup't of Oregon.

Each Superintendent will accordingly at the proper time furnish the necessary information to the Department in all matters appertaining to the execution of the Treaty and the future government of the Tribes.

The reservations will be particularly examined and reported upon to the Department.

We are Very Respectfully Your Obedient Servants,

ISAAC I. STEVENS,
Governor & Supt. Indian Affairs,
Washington Territory.

JOEL PALMER,
Superintendent Indian Affairs,
Oregon Territory.

197 GOV. OF WASHINGTON, JOEL PALMER, WALLA WALLA VALLEY. JUNE 12, '55

Transmits treaties made by them with the Nes Perses, Walla Wallas, Cayuses, and Umatillas—Copy of proceedings at the Council, and of preliminary proceedings, also of their requisition for troops.

Rec'd. August 27, '55. Acknd. September 3, '55 to Supt. P. & Gov. S. Report to Sec'y Int. July 9, —. C. W.

198 A true copy of the Record of the official proceedings at the Council in the Walla Walla Valley, held jointly by Isaac I. Stevens, Gov. & Supt., W. T. and Joel Palmer, Supt. Indian Affairs, O. T., on the part of the United States with the Tribes of Indians named in the Treaties made at that Council, June 9th and 11th, 1855.

199 PROCEEDINGS AT INDIAN TREATIES IN WASHINGTON TERRITORY EAST OF THE CASCADE MOUNTAINS

Programme of operations at the Walla Walla Council decided upon by the Commissioners, Gov., Isaac I. Stevens and Superintendent Joel Palmer, May 22nd, A. D. 1855:

Present—Indians common to both Territories, Oregon and Washington, viz Nez Perses, Cayuse and Walla Walla. Tribes in Oregon from the western boundary of the Snake Tribe to the Cascades of the Columbia. Tribes in Washington from the Bitter Root to the Cascades, except the Spokanes, Coeur D'alense, Colville, and Pend D'Oreilles.

Gov. Stevens and Gen'l Palmer, Superintendents of Washington and Oregon, to act jointly for the Nes Perses, Walla Wallas, and Cayuse, common to the two Territories. To agree upon the terms of treaty. To sign jointly. Each acting for the Indians the above tribes in his own jurisdiction.

Gen'l Palmer sole commissioner for the Oregon Indians proper present at the council. Gov. Stevens, sole commissioner for the Washington Territory Indians proper present at the council.

Gov. Stevens to preside at the council.

The proceedings to be carefully recorded for the Tribes common to the two Territories separately by the Secty. of Gov. Stevens and the Secty. of Gen'l Palmer.

The two records to be carefully compared and certified jointly by the commissioners.

Each commissioner to appoint an agent and commi'sary.

Gov. Stevens for the Washington Nes Perses, Cayuses, and Walla Wallas.

Gen'l Palmer for the Oregon Nes Perses, Cayuses, and Walla Wallas.

Goods and provisions to be distributed to the Nes Perses, Cayuses, and Walla Wallas, by the Superintendents in proportion to the Indians under the jurisdiction of each.

OFFICERS OF THE JOINT TREATY

Gov. Stevens, Gen'l Palmer, Commissioners.
James Leoty, Sect'y for Washington Territory.
Wm. McCoy, Sect'y for Oregon Territory.
H. A. Crosbie, Commissary for Washington Territory.
C. Olney, Commissary for Oregon Territory.
Agent R. F. Lansdale, in charge of Washington Nes Perses, Cayuses, and Walla Wallas.
Agent R. R. Thompson, in charge of Oregon Nes Perses, Cayuses, and Walla Wallas.
Wm. Craig, Interpreter, Washington Territory.
N. Raymond, Interpreter, Washington Territory.
——— Leaufohor, interpreter, Oregon Territory.
John Flette, interpreter, Oregon Territory.

CENSUS OF THE NES PERSES, CAYUSES, AND WALLA WALLAS

	Washington Ter'ty	*Oregon Ter'ty*	*Total*
Nes Perses	1,400	400	1,800
Cayuses	150	350	500
Walla Wallas including Utillas	600	200	800
	2,150	950	3,100

This census to be revised on the Indians reaching the ground.
200 A public table for the prominent cheifs under charge of agents Landsdale, Thompson, and Bolon.
Gov. Stevens details Palmer and F. Genitto.
Sup't Palmer also details one or two men.
Coll. Crosbie to take personal charge of issues for public table, of issues of provisions to Indian tribes, and goods distributed. Provisions and goods to be turned over to the agents, and issued under their direction.

May 28th, Monday

Agent Bolon with an interpreter went to meet the Yakamas who are supposed to be near at hand, and returned at 10 a. m. having seen Cam-i-ah-kun and also the Cheif Pee-o-pee-mox-a-mox. The latter had said to Mr. Bolon, "that someone had informed him that the cheifs and others in the Commissioners camp had said that he was unfriendly to the whites. That his heart was with the Cayuses whose hearts were bad. He was very sorry to hear this. He had always been friendly to the whites and was so now. He should go today to see the Commissioners, and ask why such things had been said of him."
The Commissioners and Sec'ty Doty visited the Lawyer at his lodge, as he was unable to walk without great difficulty. An old

gun-shot wound received at the Battle of Pierres Hole, having broken open again causing much pain.

The Lawyer explained a map of the Nes Perses country which he had drawn for Gov. Stevens. Several cheifs came in and suddenly U-u-sune-mal-e-can, one of the cheifs, said:

"The Cayuses wish us to go to their camp and hold a council with them and Pee-opee-mox-a-mox.

What have we to say to the Cayuses or Pee-o-pee-mox-a-mox? What are their hearts to us? Did we propose to hold a council with them or ask them for advise? Our hearts are Nes Perses hearts and we know them. We came here to hold a great council with the Great Cheif of the Americans, and we know the straight forward truth to pursue and are alone responsible for our actions. Three Cayuses came last night and spoke to Jim and two other head men urging them to come to a council at the Cayuse camp, to meet Pee-o-pee-mox-a-mox and Cam-i-ah-kun. He did not wish to go; they insisted; then I said to them: You had best say no more. His mind is made up.

What do you come here for and ask these cheifs to come to a council when to the Head Cheif and the rest you say nothing? Have we not told your messenger, yesterday, that our hearts are not Cayuse hearts? Go home; Our chiefs will not go. We have our own people to take care of, they give us enough trouble, and we will not have the Cayuse troubles on our hands. This is my heart."

Lawyer opened a book containing in their own language the advice left to them by their Great Cheif Ellis, and read as follows: Ellis said,

"Whenever the Great Cheif of the Americans shall come into your country to give you laws, accept them. The Walla Wallas heart is a Walla Wallas; a Cayuse heart is a Cayuse; so is a Yakamas heart a Yakamas; a Nes Perses heart is a Nes Perses heart; but they have all received the white law. They are all going straight, yes: While the Nes Perses are going straight, why should they turn aside to follow others who are going straight? Ellis, advice is to accept the white law. I have read it to you to show my heart."

The Commissioners are glad to hear what had been spoken. They knew the Nes Perses were always friendly to the whites. Lewis & Clark had said this and all white men. The Commissioners were friendly to all Indians, and when they come together would tell them so, and show it by what they propose to do. They had no more to say now because when they spoke they wanted all the Indians to hear. The Commissioners then returned to camp.

201 At 11 a. m. Pee-o-pee-mox-a-mox, Can-i-ah-kun, Owhi, Skloom, and a number of Walla Wallas and Yakamas rode into camp, and having shaken hands in the most friendly manner with the Commissioners and agents, seated themselves under the arbor in front of the commissioners tent and indulged in a smoke; using their own tobacco exclusively although other was offered them.

Gov. Stevens then said to them: "My friends, we are glad to see you. We are glad to see all the Indians around here, and what we say to one is the same to all. You will see that what we say to one tribe is spoken to all the tribes. When you are ready to come into council, when the council is opened, we will speak to you of the important business for which you have been called together. We have near to our hearts the prosperity of the Indians and the propositions to be made to you will prove this.

"We shall endeavor to clearly explain the wishes of the Government, in order that you may fully understand them; as it is our desire you should.

"If it is consistent to you we will suggest tomorrow at noon as the time for opening the council. We look upon you as friends, shall so speak to you; as one friend speaks to another, and wish you to reply as such."

Gen'l Palmer said: "I am equally pleased with Gov. Stevens to see you. Many years ago I met you and considered you friends, and I look upon you as the same now, and hope our meeting will prove this to be true.

"We have come to promote peace and happiness among you, leaving behind all that was bad, bringing only that which was good; thus we have but one heart. When you understand this then there will be no difficulty, but we will all work together for the best.

"As all the cheifs are not here we will not speak of important business, but wait until all are present.

"I want to know if the time fixed by Gov. Stevens for opening the council is good, and if you will meet."

Pee-opee-mox-a-mox said: "I want more than one interpreter at the Council, that we may know they translate truly."

Gen'l Palmer said: "You may have anyone who can comprehend what he is told to interpret, and who will suit you. We wish you to understand clearly what is said. Will you designate a interpreter whom you have confidence in?"

The Cheif said: "I do not wish my boys running around the camps of the whites as these young men do " (alluding to some young Nes Perses who were lounging about our camp feeling quite at home as they know themselves to be among friends).

Pee-o-pee-mox-a-mox said: "We have rode over today merely to see the Commissioners."

Gov. Stevens said: "Come and see us as our friends and guests. Cam-i-ah-kun knows that our people have been in his country, and eaten of his food. So of Pee-opee-mox-a-mox and the Nes Perses. We always give food to our friends when they visit us, you have been invited to come and you are welcome to whatever we have.

"We have a public table at which we are glad to have all our friends sit, and share that which hospitality induces us to offer.

"We have provided plenty of food, and have already given beef, corn, and potatoes to those on the ground. They were invited and we wish them to have plenty to eat.

"I was glad to hear that my friend Skloom had been so kind to Mr. Tinkham one of my party who crossed the mountains. He was in want and Skloom gave him provisions and clothing."

The Cheifs then took their leave.

202 PROCEEDINGS AT THE COUNCIL HELD AT CAMP STEVENS WALLA WALLA VALLEY, ON THE 29TH DAY OF MAY 1855

Gov. Stevens, Superintendent of Indian Affairs in Washington Territory, and Gen'l Joel Palmer, Superintendent of Indian Affairs in Oregon Territory, with the following named cheifs, delegates and head men present at the Council, and representing their respective tribes and bands of Indians as below stated.

For the Nes Perses: Lawyer, Joseph, U-u-suns-mal-o-can, James, Timothy, Red Wolfe, Spotted Eagle, Three Feathers, Jason, Jacobs, Cow-pook, Is-coh-tim, Kay-kay-map, Tu-por-lan-its-a-kum, Billy, Toh-teh-molk-e-wot, The Snipe, Bald Eagle, and others.

For the Cayuses: The Young Cheif, Stosolmo, Comaspilo, and others.

For the Walla Wallas: Pee-o-pee-mox-a-mox.

For the Yakamas: Cam-i-ah-kun, Ow-hi, Skloom, Kow-was-say-ie, Si-ry-was, Skin-pah.

For the Palouses: Kah-lat-toose.

For the Spokanes: Garry.

For the Pisquose and Methows.

For the Cak-kin-a-kanos.

On May 29th at 2:02 p. m. the Council opened. Present: the commissioners, officers of Treaties, the Indian agents, and some fifty citizens.

Besides the Indian cheifs already mentioned and some others, about 1,800 Indians, Nes Perses, Cayuses, Walla Wallas, Ya-

kamas; Dalles Indians, and others on the Columbia above were assembled.

After the pipe had been smoked sometime, Gov. Stevens said: My Children: Before entering upon the council we must have good and faithful interpreters. We want men who will state truly and exactly all that is said; we want men that you know to be good men; men that you can trust; we want no others.

We propose as interpreters for the Nes Perses, William Craig, this man [pointing to Mr. Craig], who has lived with you, also McDauphin and Delaware Jim.

For the Cayuses Mr. Posbrom and Mr. Olney.

For the Walla Wallas and Yakamas, John Whitford.

Thus for each language we propose to have two and three interpreters. Now I ask you, do you want others added to the number? Are you satisfied with these men? If you have any others you wish to propose, speak out, for we wish you to be satisfied.

Stackus, a Cayuse said: We know of no others whom we would wish. There may be some words hard for them to make us understand, but we think the arrangement good as it is.

Gov. Stevens said: When you cannot understand what we say to you, stop us and we will repeat it.

203 Each interpreter will now be sworn to be a faithful interpreter.

Gov. Stevens then administered to the interpreters the following oath.

You solemnly swear in the presence of Almighty God, that you will well and truly interpret to the best of your ability what may be said by the Commissioners for the United States holding this council on the one part; and the cheifs and head men of the tribes and bands of Indians here present on the other part. So help you God.

Gov. Stevens then said: My children, the interpreters here have each taken a solemn oath in the presence of Almighty God, to be true and faithful interpreters. I will now read the form of the oath [and it was read as above].

Gov. Stevens continued: My children, I have much to say to you; my brother here, Gen'l Palmer, will have much to say to you. We want you to listen and be comfortable at the same time. We want clear skies, we want the ground to be dry. We will meet to-morrow with a clear sun and the day before us. Then we will open the whole subject, and will see if our hearts and your hearts will not come together.

We have met as friends today, tomorrow we will meet as friends and then enter upon our business. I therefore adjourn the council

till 10 o'clock a. m. tomorrow. The weather is rainy and bad, tomorrow we hope the skies will be clear and you will be able to be present. Should it rain tomorrow we will meet when it clears up.

One word on another point, you have come here by our invitation and are our guests. I have entered, and so has my friend here Gen'l Palmer, many an Indian lodge, and they always gave us to eat and drink. We therefore have brought provisions which we offer to you as a friend to a guest; and we therefore trust you will all feel free to receive the provisions we have brought to furnish you with as our guests.

I propose to the Walla Wallas, Cayuses, and Yakamas that you take two oxen, drive to your camp and slaughter for yourselves.

Young Cheif replied: We have plenty of cattle, they are close to our camp. We have already killed three and have plenty of provisions.

Gov. Stevens said: We are much pleased to hear you are so well provided for, but we have plenty of provisions and you are welcome to them.

Young Cheif replied: We have plenty at present. We do not throw away your offer. If we want any we will come to you.

Gen'l Palmer (to the interpreter): Say to the Yakamas: You have come a long ways. You may not have provisions. If you want any we have them and you are welcome.

Young Cheif said: Cam-i-ah-kun is supplied at our camp.

Gov. Stevens said: There will be no more said today unless you wish to say something.

Young Cheif said: We have nothing to say today; the weather is bad, rainy. We do not throw away your offer; when we are done talking you will know our hearts. We will talk slow not all in one day. No snow falls at this season of the year. There will be time for you to go anywhere you wish.

The council then broke up and nearly all the Indians returned to their camps.

Pee-o-pee-mox-a-mox and Cam-i-ah-kun dined with the Commissioners and remained in their tent sometime smoking in a friendly manner.

Timothy, a Nes Perses cheif acted as crier for his nation and he will also record in their language the full proceedings each day of the council and this will be preserved among the archives of the nation and handed down to future generations.

204 May 30—Wednesday

At 1 o'clock P. M. the Indians began to assemble and at 1¾ P. M. the Council opened. Present same as yesterday.

Gen'l Palmer said: My friends, I am glad to see so many of you here today. Yesterday the council was organized and Interpreters sworn to repeat to you what we say. Today my brother in Council will speak to you the great desire that our Chief has to promote your good.

I know that our Great Chief has a good heart. I know that my brother Gov. Stevens has a good heart, that they both desire to do and act for your good. I hope then you have come here with good hearts to listen to what he has to say. We both come here to talk to you as man and not as boys; we throw behind us everything that is bad, and come to you with one heart; we hope you have done the same. You are men able to judge between good and bad; and when my brother speaks to you, you can judge whether it be good or bad.

For the present I am done, and my brother will speak to you.

Gov. Stevens said: My Children, the sky is clear, the ground is dry, my heart is glad today. Our hearts are glad. You are men. You have families; you have the means to live.

You have all of you been friends to me and mine. Two years since I came among you. Two years only have I known you; I came from the great waters beyond the mountains, across the mountains, and you have all been friends to me.

The Nes Perses, Lawyer fed my men driven out of the mountains by snow; the Cayuses and Walla Wallas received my men kindly; Pee-o-pei-mox-a-mox saw us in his country and gave us guides; the young cheif and his people had nothing but smiles and kindness for us; and yesterday Cam-i-ah-kun showed me a paper from Capt. McClelland saying that he furnished guides and welcomed them on their way.

So to the North and East; there sits a Flat Head and there a Couer D'lane on the route across the Bitter Route; there are Poulouses and Colvilles and Spokanes away to the North; there are also men from both sides of the river, from far down; all were kind, and I brought a message to all, from a tribe beyond the mountains; I have been among the Black-feet and have brought word that they would meet you in Council, and that war should cease.

I met you in the trail, I saw your people in the Buffalo country; I met your people on the road to the Buffalo country. My heart said peace in the Buffalo country, peace here; peace is here now; peace between yourselves, peace between us. So for your kind-

ness to me I am your friend, and I came from the Great Father to be your friend.

The interpreters yesterday took a solemn oath to speak truly. I took a solemn oath and my brother took a solemn oath to be your friends.

The Great Father has learned much of you. He first learned of you from Lewis & Clarke; Pee-o-pee-mox-a-mox remembers Lewis & Clarke, the Lawyer does; they came through your country finding friends and meeting no enemies.

I went back to the Great Father last year to say that you had been good, you had been kind, he must do something for you. My brother wrote to the Great Father in like manner.

He told the Great Father, these men have farms; the Great Father said I want them to have more and larger farms; I told him you had cattle and horses; he answered that he wanted your horses and cattle to increase; I told him some of your grown people could read and write; he answered, I want all the grown people and all the children to learn to read and write; I told him that some of you were handy at trades; he answered, that he desired to give all who choose the means to learn these trades.

Why did the Great Father answer in this way? Why did he send my brother and myself here this day, to say this to you? Becatse you are his children; his red children are as dear to him as his white children; his red children are men, they have hearts, they have sense; they feel kindness; they resent injury; we want kindness on the one side and kindness on the other, we want no injuries to resent.

The Great Father has been for many years caring for his red children across the mountains; there [pointing East] many treaties have been made. Many councils have been held; and there it had been found that with farms and with schools and with shops and with laws the red man could be protected.

Why do I say laws? What has made trouble between the white man and the red man? Did Lewis and Clark make trouble? They came from the Great Father; did I and mine make trouble? No, but the trouble had been made generally by bad white men and the Great Father knows it, hence laws.

The Great Father therefore desires to make arrangements so you can be protected from these bad white men, and so they can be punished for their misdeeds; and the Great Father expects you will treat his white children as he will make a law they shall treat you. We are now in council to see if we can arrange the terms which will carry this into effect.

Let us go back to old times across the mountains and see what was there done. The red man received the white man gladly; but

after a while difficulties arose; the blood of the red man was spilled and the blood of the white man; there was cold; there was hunger; there was death. But a man came, William Penn, and said I will see if my white children and my red children cannot be friends, and they were friends: Wm. Penn and the Indians came together as we now come together; they made a Treaty; there was peace; and no white man's blood and no red man's blood had been shed, and there has been peace to this day; this was in olden times.

Oh! these people said we too will make treaties; we too will live in peace. They tried various plans, a plan that worked well when there were but a few whites, did not work well when there were many. It was found that when the white man and the red man lived together on the same ground, the white man got the advantages and the red man passed away.

The Great Fathers name at that time was Andrew Jackson. He said I will take the red man across a great river into a fine country where I can take care of them; they have been there twenty years; they have their government, they have their schools, they have their own laws; their Cheif, John Ross knows as much as my brother or myself and a great deal more; he is what you call a Lawyer; he is an Indian, a Cherokee. When he goes to see the Great Father, the President, he sits with him at table as you sit with us at table.

Before you met my brother and myself in council, you have your own council; and the Great Father when he acts has his council also, he has his cheifs.

When I saw the Great Father he called his cheifs together, and had a council about you. He has two cheifs who have the care of the red men, their names are Gen'l Orr and Robert Johnson, I want you to remember them. Robert Johnson lives near John Ross; they both told me that what had been done for John Ross should be done for you, and more, as I will tell you.

As we grow older we learn more and grow wiser; so of the Great Father and his cheifs; they did much for John Ross and his people twenty years ago; they have learned much since and know better what to do; they find one thing however the same now as then.

206 They gave John Ross and his people a tract of land into which no white man could go without their consent; they sent them an agent, they had schools, they had mills, they had shops, they had teachers, they had doctors, they had farmers. I repeat again, no white man could go there unless the red man consented to it.

North of that tract of land the whites are going in but they cannot enter it. South of that tract of land the whites are going

in but they cannot enter it; that tract of land is the Indians' home; his home and the home of his children.

There are other tracts of land East of the mountains set apart for the red man's home; for there are many tribes. Those tracts the white man cannot enter without the consent of the red man. On all these tracts the red man has schools and farms and mills; they have teachers and physicians and an agent.

Now listen carefully: On these tracts the land was all in common, there were one or more larger fields for the tribes but no man had his special field; the Great Father and his chiefs now think that is not good; the Great Father said, the white man has his farm, his cattle, and his horses; the red man shall have his farm, his cattle, and his horses; the Great Father says that when on that tract of land an Indian has his field, that field should be his.

This brings us now to the question. What shall we do at this council? We want you and ourselves to agree upon tracts of land where you will live; in those tracts of land we want each man who will work to have his own land, his own horses, his own cattle, and his own home for himself and his children. On each tract we want an agent to live who shall be your brother, and who shall protect you from bad white men. I shall speak more on this subject by and by.

On each tract we wish to have one or more schools; we want on each tract one or more blacksmiths; one or more carpenters; one or more farmers; we want you and your children to learn to make ploughs, to learn to make waggons, and everything which you need in your house. We want your women and your daughters to spin, and to weave and to make clothes. We want to do this for a certain number of years.

Then you, the men, will be farmers and mechanics, or you will be doctors and lawyers like white men; your women and your daughters will then teach their children, those who come after them to spin, to weave, to knit, to sew, and all the work of the house and lodges; you will have your own teachers, your own farmers, blacksmiths, wheelwrights, and mechanics; besides this we want on each tract a sawmill and a gristmill.

Now we want you to agree with us to such a state of things. You to have your tract with all these things; the rest to be the Great Father's for his white children.

Besides all these things, these shops, these mills, and these schools which I have mentioned, we must pay you for the land which you give to the Great Father; these schools and mills and shops, are only a portion of the payment. We want besides to agree with you for a fair sum to be given for your lands, to be paid through a term of years as are your schools and your shops.

Now these payments are something you will have to think much about. Whatever is done is done with your free consent; I have more to say about these payments, about the agent, and about your doing better, as I think you will if we can agree.

I am tired of speaking; you are tired of listening. I will speak tomorrow. My brother will now say a few words to you.

Gen'l Palmer said: I shall say but little to you today; it is not expected we can come together with one day's talk; nor do
207 we expect you can understand with what has been said all that we want. You will not make up their mind until you hear all we have to say.

Tomorrow my brother will say something more to you; when he is through then I will speak to you. Sometimes when people have a matter to settle they commence way off; but as they understand each other they come together. With us, if we commenced way off, I hope we are a little nearer now, and by and by I hope we shall come quite together.

As we expect you are tired sitting, and as we do not wish to say too much at once, we will speak no more.

We will meet tomorrow if you like, at an earlier hour, say 10 A. M., and you can come without our sending for you. If any present wish to say anything, we are ready to listen to it.

No reply was made by the Indians and the Council then adjourned at 4½ P. M.

208 May 31st—Thursday

The Indians assembled at 11½ A. M. and at 12 m. the council commenced.

Gov. Stevens said: My children, I said to you yesterday we want you to agree to live on tracts of land, which shall be your own and your children's; we want you to sell the land you do not need to your Great Father; we want you to agree with us upon the payments for these lands; we want you to have schools and mills and shops and farms; we want you to have teachers and millwrights and farmers and artisans; we want your people to learn to read and write; your men and boys to be farmers or millwrights or mechanics, or to be of some profession as a lawyer or a doctor. We want your wives and daughters to learn to spin and to weave and to make clothes and all the labor of the house; this for a number of years as we may agree.

I said yesterday this would only be a part of the payment. We want also for a certain number of years to furnish you with some clothing, clothing for your men, your women, and your children.

I will mention only some of the principal articles; there will be blankets and cloth for leggings, clothes made, shirts, and other articles for the men and boys; there will also be blankets and shawls

and calicos and shirting and other articles for the women and girls. The particular articles, however, will be agreed upon between yourselves each year; you may want certain articles one year, and different articles the next.

Besides clothing we would wish to furnish you with tools and implements for the shops; for the blacksmith, for the wheelwright, for the tinsmith and such other tools as you might need; we also want to provide you with tools for your farms, with ploughs and hoes and shovels and when you get further advanced with reapers and all the implements white man has; we want in your houses plates and cups and brass and tin kettles; frying pans to cook your meat and bake ovens to bake your bread, like white people.

I have told you about the mill to grind wheat and corn, and about the mill to saw boards and lumber, and that we should employ carpenters in your service.

We want you by and by to live in houses and we shall furnish you with a mill to saw lumber, and with carpenters, and your own people by and by will become carpenters and then you will have houses; all this for a term of years. Then we hope that all you people, every family will have its farm, its cattle, its horses, and I trust, its sheep; then I said you will have your own teachers and your own schools; you will have your own smiths, your own wheelwrights, your own carpenters, your own physicians and lawyers, and other learned men.

I told you of John Ross. As your fathers and your friends we think this will be good for you.

In thinking over the matter we want you to bear in mind what you have seen and what you know. That venerable old man Jim recollects when he first saw a house in this country; you all of you recollect when you first saw cattle, now you count your horses and your cattle by thousands.

The horse carries you whither you wish to go, yourself, your wife, your children; and your packs, and he works in your fields; your cattle now furnish you with a portion of your food; your cows furnish you with milk and you already know how to make butter; we trust that you will make butter and cheese; and that your women will all have churns. Formerly you raised no wheat, no potatoes. Now you have both grain and vegetables. Is not this a great change? A change which you all have seen. Has it not been for your good?

Let us look at it now in a different way. My brother said yesterday he would have much to say today.

209 We do not want you to agree not to get roots and berries, and not to go off to the Buffalo; we want you to have your roots and to get your berries, and to kill your game; we want you if you wish to mount your horses and go to the Buffalo plains, and

we want more; we want you to have peace there. What has disturbed you on those plains? The Blackfeet tribe of Indians who stole your horses and murdered your grown people and your children; we want that to cease forever.

The Blackfeet are not all bad people; they have some good chiefs among them and some good men; a part of them promised me two years ago not to make war upon you, and those have kept their promise; I could not see all, and those I could not see have since given trouble. But I left with them a man who spent a whole year with them; a man whom you have seen here; a man who writes at that table. He traveled all through their country, sometimes alone, sometimes with two or three men; he saw them all; he talked to them about you, and they promised to meet you in council this year and made a peace with you, to murder no longer your people, to steal no longer your horses.

The Blackfeet have now began to think, if we stop stealing horses from the Indians this side of the mountains, what will become of our bands of horses? They will pass away. Raise your own horses says Mr. Doty as do the Flat Heads, the Nes Perses, the Cayuses, the Walla Wallas, the Coeur D'lanes, the Spokanes, the Yakamas, and so back to the Flat Heads again. The Blackfeet then said, the Buffalo are not as plenty as formerly, we have to eat too many old bulls.

Doty then talked about you, said you had your fields, horses, and cattle, and raised your own milk, meat, and vegetables. The Blackfeet then said we too would like to have farms; we would like to have cattle and milk and bread.

The Blackfeet and other tribes who live in the Buffalo country, see that the Buffalo cannot subsist there forever; they feel that unless they change their mode of life, they will soon pass away.

They desire to change their mode of life. We shall help them provided they agree not to molest you.

When you see the Blackfeet at the Council they will ask you many questions, they will want you to tell them when you first had horses and cattle, and when you first had crops. If we agree at this council they will ask you all about that; and you will tell them you have not as much game as you once had, and the time is coming when you will not have dressed skins for your clothing; you will tell them the Buffalo is passing away, and the time will come when we will not have robes for our tents and lodges; we have already changed and found it for our good, and we are determined to make another change in good season: we have made a bargain with the Great Father: we will have instead of tents of lodge skin when there are no Buffalo, houses of boards and of lumber; when the elk and the deer and the buffalo pass away, then we will have clothing, every man and

woman and child like the white man; we have enough now to do to get roots and game and berries for our children; but we intend then to raise enough for our women and children, when their numbers have increased, and roots and berries and game are no longer to be found.

If we can agree here, this you will be able to say to the Blackfeet, and the Blackfeet will say, we will eat old bulls no longer, we will not starve, we will not die of cold, we will do as you have done, we will be friends, we will chase the Buffalo together on the plains, we will be friends forever.

I have spoken of an agent, I will speak more. If we agree at the council we have many things to do for you; the agent will live with you and see that it is done; if you think we have not done our part go to the agent and tell him so, and he will see that we do do it. If we think you have not done your part the agent will go to the cheifs and say so frankly and arrange it with them; he will be your elder brother, and will see that you are not wronged, and that the bargain is carried out.

I have much more in my heart to say but not now, there will be time enough by and by; my brother Gen'l Palmer has to speak, he is your friend as I am but he has known you longer, and he can speak to you better than myself; he feels for you and you will find that every word which he says comes from a desire to serve you.

If you wish to hear him now he is ready to speak.

Gen'l Palmer said: My friends, I do not wish to tire your patience too long, I have something to say to you, if you will listen a little longer I will speak.

My brother here speaks truly, when he says I desire to speak and act for your good.

In order to explain more fully the course pursued by the government towards the Indians on the other side of the mountains I will tell you of it; my brother here has referred to that subject and I may perhaps have to repeat his words.

He has told you something about our first settlements among the Indians over the mountains; those settlements were made over Three hundred and sixty years ago. First came a cheif with several of his brethren in three ships across the ocean, they found many Indians in that country who received them kindly, they gave to them food and received in return beads and various trinkets; that cheif after traveling over a great extent of country and visiting many villages left part of his people and returned home.

After having been absent some time he returned and many others, upon arriving at the point where he had left his children,

none could be found. After the Cheif left, these people began to quarrel among themselves and with the Indians.

There were many causes for this; a portion of the Indians whose hearts were not good, stole the property belonging to these people; the whites retaliated by whipping and ill treating them. That was the first offense on the part of the Indians; the whites had long been without women and they often took forcibly the women of the Indians; this induced them on their part to retaliate; these difficulties continued from bad to worse until finally there was war; our people were but few, the Indians many; our people were all killed; there were also many Indians killed. Upon seeing our Cheif return with his vessel and other vessels and so many people they fled; they knew that had done wrong as well as the whites, and they expected they would be punished for it; this time our Cheifs bro't with them their women and children and cattle and horses, and tools to work with.

The Indians seeing they were not interfering with them returned and for a while they lived together in peace; but they lived indiscriminately together, a white man here and an Indian there; but they could not long live thus; their customs and mode of life was different, they did not understand each other; they continued a number of years with little difficulties occurring, occasionally killing one another until it finally broke out with another war; peace would sometimes be made and last for a little time, but finally they would get foolish and their hearts would get bad; as it is said in this country sometimes: in this part of the country by the young men they are few, we are many, let us wipe them out.

They finally made war, a council was held, speeches and harangues were made and they declared war, a few white men were killed and many Indians were killed; there were more Indians killed than white men because we had better arms and know how to make them. This war continued some time but finally they had peace; the whites brought with them and made after they arrived here whiskey; this the Indians were very fond of and like all other persons after drinking it were foolish; they quarreled among themselves and killed each other and some whites in their drunken frolics; our cheif saw this condition and desired to do them good; he saw that the Indians and the white man could not live peaceably together: he called the Indians together in council; he proposed as we propose in this council,
to purchase their country and select a place for them to
211 live; he proposed to have a district of country set aside for
the Indians to live in that no white man should live there;
but the Indians said No! why should we leave the bones of our

fathers and go to a strange land; we have plenty of elk, deer, bear, berries, and roots; we like you let us live together, we don't want to cultivate the soil, you are welcome to occupy it; they were told that the wild game, the roots, and the berries would not last always; they said they were a great and numerous people, they knew what was best for them and did not want our counsel; they quit talking, the whites went to their houses and Indians to their lodges; our people continued coming; every year vessels came until our people got as numerous as the leaves on the trees.

It was but a few years before their game was all killed off; for the white man killed the game as well as the Indians; the Indians had no food in his lodges, the women and children were hungry; at last they commenced stealing our peoples property and plundering their houses; our people were forced to retaliate by whipping and shooting some of them. The Indians again sent messengers to the surrounding tribes to call them to make war; they resolved in council to exterminate the whites, kill them off; they commenced by burning houses, murdering women and children, and killed a good many of our people; finally our warriors were collected and they had war; they did not understand our mode of warfare and thousands of Indians were killed and but few of our people were killed in the battles. This continued for a long time and the tribes finally concluded they had been acting foolish, and that they would receive the talk of our cheif.

Those that were left finally agreed to meet our cheif in council; they did so and there was peace. In that council it was agreed by the Indians that they would reside on a certain district, set aside for them certain limits, certain bounds; they agreed in that council to live in peace with the whites, and to commit no depredations on them, and to live at peace with other tribes; our cheif agreed that we would build them mills, blacksmith shops, carpenters shops, and supply them with all necessary fixtures.

Our cheif directed his agents to build those mills and school houses and shops, and he employed teachers and smiths and millers and sent them among them. They supplied them with cattle and horses and oxen and ploughs and waggons and every variety of farming tools.

These Indians then began to see that they had acted very foolish, and that when they supposed they knew enough for them and did not want any of our counsel, they knew nothing, they were as blind men; they have since been learning and continued to learn and prosper, and are now a great happy and good people; there were a few tribes who refused to go into that council, who refused to treat. What was the condition of that people? Those who thought themselves very wise and refused to take the advice

of the white people those who continued to make war upon our people? Their game was all killed, they had nothing to eat, they fled to the mountains then they continued to live but a few years of miserable existence, until they were finally overtaken by more powerful tribes and all killed. There were other tribes in other districts of country, who heeded the advice of the chief and were set aside in districts of country belonging to themselves.

In all cases where they have entered into a treaty and agreed to reside upon tracts set apart for them our chief has aided them. All who have settled upon those tracts have not done well, for they are lazy and have foolishly thrown away what has been paid them.

But you as a people know how to appreciate these advantages and would not throw them away; all experience we have had with Indians these Three hundred and sixty years shows us that the white man and the red man cannot live happily together; 212 although we may live near together there should be a line of distinction drawn so that the Indians may know where his land is and the white man where his land is; you are all able to judge for yourselves by the constant difficulties that are occurring here among you, between the whites and the Indians.

We have some people whose hearts are bad, who violate our laws; we have men who are afraid to live in the settlements, they seek opportunities to go among people at a distance, among the Indians; as an evidence of that I need only refer to matters that have transpired within the past four weeks in your own country; a few men had formed a plot by which they were to get your horses; their plan was this: Part of those men went over into your bands and if they found any horse branded took a description of it, wrote it down in a book; when they had visited all your bands and got the description they would go away. Sometime after they would take their book and give one of their party a description of these horses and an order to get them; when they gather up all these horses they will drive them off to the Grande Ronde or some place in the Blue Mountains; they contemplate when they had got the stray horses coming back and driving all your horses to Salt Lake; but a short time ago Mr. Thompson came up and learned the trick; he went below and took out a warrant for them and these soldiers came up to try and arrest them.

It is these men I am told who would rob you of your property, who are giving you advice not to treat with us; whose counsels do you prefer to take? These men who would rob you, or ours who come to befriend you? These men who came here are strangers to you with smooth tongues, they care nothing about the truth. I don't mean to say that all who come among you are bad men;

I am afraid there are a few of these young men who come to live among you and wish to get your women, not because they desire your women but because they want your horses; they will come and remain among you a few years, get a woman and raise children, but when they get a band of horses around them, they will be off and leave the women and children without anything; I have been told that one of these men has been in your camp since we have been holding this council, advising you to have nothing to do with us; these men you cannot tell always who they are, but all such men need watching; you will now be able to judge who are your friends, such men or myself and my brother who have come here to act for your good.

We have been talking a good while and you have been listening. You are tired sitting. I have more to say to you but I will leave it till tomorrow and say no more at present.

The Council then adjourned at 3½ P. M.

In the evening the Young Cheif sent a message to the Commissioners to the effect that he should be pleased if no council should be held tomorrow, as his people desired to make a great Feast and have a general holiday. To which request the Commissioners acceded.

Lawyer, Pee-o-pee-mox-a-mox, Young Cheif and Cam-i-ah-kun dined at Gov. Stevens table with Gen'l Palmer and the gentlemen of the party.

June 1st—Friday

All about the Treaty Ground was very quiet, all the principal Cheifs dined at Gov. Stevens table.

The day was extremely warm and to have held a council would have been most uncomfortable.

213 June 2nd—Saturday

The Indians began to collect at 11½ A. M. Some delay was occasioned by the nonappearance of Cam-i-ah-kun and Ow-hi. But at 12 M. all the cheifs being present the council opened.

Gen'l Palmer said: My friends, we have met here today to continue the talk; I shall try and speak so that you may understand me.

I have said that the white man and the Indians could not long live together in peace, a few may do so, but where there are many we cannot do it. If your Cheifs are unable to restrain your people where there are but few, how can our Cheif prevent his people from doing wrong when they are so many and scattered over so large an extend of country.

It is but fifty years since the first white man came among you, those were Lewis and Clark who came down the Big River—the

Columbia. Next came Mr. Hunt and his party, then came the Hudson Bay Co. who were traders. Next came missionaries; these were followed by emegrants with waggons across the plains; and now we have a good many settlers in the country below you.

If there were no other whites coming into the country we might get along in peace: You may ask, why do they come? Can you stop the waters of the Columbia river from flowing on its course? Can you prevent the wind from blowing? Can you prevent the rain from falling? Can you prevent the whites from coming? You are answered No! Like the grasshoppers on the plains; some years there will be more come than others, you cannot stop them. Our chief cannot stop them, we cannot stop them; they say this land was not made for you alone, the air that we breathe, the water that we drink, was made for all. The fish that come up the rivers, and the beasts that roam through the forests and the plains, and the fowls of the air, were alike made for the white man and the red man.

Who can say that this is mine and that is yours? The white man will come to enjoy these blessings with you; what shall we do to protect you and preserve peace? There are but few whites here now, there will be many, let us like wise men, act so as to prevent trouble.

And now while there is room to select for you a home where there are no white men living let us do so. I have made treaties with all the Indians tribes in the Willamette Valley, with all in the Umqua Valley, with all in the Rogue River and Shasta country; they have agreed to remove to such tracts as shall be selected for them; they have agreed to be friendly with the whites and all other Indians; they have sold us all their country except the reservations; we have agreed to build them mills, blacksmith shops, waggonmakers shop, to erect a tin shop and gun smith shop, to build a school house and hospital, to employ millers, mechanics, school teachers, doctors, and farmers, all these expenses to be paid by the government for twenty years.

Do you want these things? Do you want a saw mill to saw the timber to build your house? You have a few lodges now, how long will they last? by and by where will you get your hides to make lodges? Gov. Stevens told you that the Blackfeet said the Buffalo were not as plenty as they were once; it is but a few years since there were a plenty of Buffalo at Fort Hall. Mr. Craig here has seen many of them there and probably others of you have; where are they now? all gone;

Do you want mills to grind your wheat and your corn? Do you want blacksmiths to make your ploughs and harrows? To make your axes, hatchets, hoes, knives, and to shoe your

214 horses? Do you want a gun-smith to mend your guns when broken? Do you want a tinner to mend your kittles, your pans, and cups? Do you want a carpenter to build your houses and a waggon maker to make your waggons? Do you want a shoe maker to make your boots & shoes? Do you want a doctor to attend to the sick and give them proper medicines? Do you want farmers to assist you and show you how to raise wheat, corn, and potatoes? Do you want school teachers to teach your children how to read and write? Is it not good that these men can write down what is said here and understand what it is? It would make my heart glad if you could all do so. It would make my brother's heart glad if you could all do so; would it not be good if you wanted to talk with my brother, or if you wanted to talk with our Great Chief? If you knew how to write and wanted to talk you could send it to him on paper and he would know your heart; would it not be good then to have schools among you?

Do you want to have plenty of provisions for your women and children? Do you want to have plenty of blankets and clothing? The deer skin and the elk skin cannot always be had to make your clothing; do you always want to live at peace with all persons? If you want all these things we are ready to give them to you; when we know your hearts then we shall know whether you want these things or not.

You have often been told that by and by our Great Cheif would send some person to buy your country. I suppose you have been looking for that person a long time; Dr. White came here. What did he do? He may have talked very well to you but what use? Mr. Wampool came, what did he do for you? My brother and myself have come, we have not only come to talk but to do something. Will you receive it or will you throw it behind you? We did not come here to scare you or to drive you away, but we came here to talk to you like men, and to make such arrangements as to preserve peace and protect you. Our agents have tried to protect you in all your rights; but I am fearful they will not always be able to do so, if you continue to live in this scattered condition. I see here a good many old people. I expect you have left a good many of your old people at home; we want to do them some good while they yet live, and if you enter into a treaty with us we can then do them some good and do you all good; if we enter into a treaty now we can select a good country for you; but if we wait till the country is filled up with whites, where will we find such a place? My heart is that it is better for you to enter into a treaty now with us. I know that my brother has a good heart and wants to do you good, but we do not know how long we can

act for you. Perhaps it may not be long before other agents will come; the next that come may not have such good hearts and do as much for you as we will.

If we make a treaty with you and our Great Cheif and his council approves it, you can rely on all its provisions being carried out strictly. My heart is that it is wise for you to do so. I will not speak any longer.

Gov. Stevens said: My Children, my brother and myself have opened our hearts to you, we want you to open your hearts to us.

Five Crows said: We are tired.

Gen'l Palmer said: We are not expecting to say any more today.

Five Crows said: I have a little to say. Do you speak true that you call me brother? We have but one Father in Heaven; it is He [pointing above] who has made all the earth; He made us of earth on this earth; He made our Fathers; when he gave us this earth. He gave no gardens.

215 He created our Fathers when he created Adam; we were divided into different countries; It was He, the Almighty, that passed the law; He is the same God that made the Ten Commandments; He said my Children you must do no evil; you must not steal, you shall not take anything without payment; the Great Father says he will send the theif into fire—into hell——

The Commissioners said will you speak now or on Monday?

Pee-o-pee-mox-a-mox said: Why not speak tomorrow as well as today? We have listened to all you have to say, and we desire you should listen when any Indian speaks. It appears that Craig knows the hearts of his people, that the whole has been prearranged in the hearts of the Indians; that he wants an answer immediately without giving them time to think; that the Indians have had nothing to say so far it would appear that we have no cheif.

I know the value of your speech from having experienced the same in California, having seen treaties there. We have not seen in a true light the object of your speeches; as if there was a post set between us, as if my heart cried from what you have said; as if the Almighty came down upon us here this day; as if He would say, What are you saying? Look at yourselves your flesh is white mine is different, mine looks poor; our languages are different. If you would speak straight then I would think you spoke well; we have come together to speak about the earth and not of God; you were not afraid of the Devil!

You see this earth that we are sitting on; this country is small in all directions. Why should you fear to speak on Sunday? Should I speak to you of things that have been long ago as you have done? The whites made me do what they pleased, they told me to do this and that and I did it; they used to make our women to smoke; I suppose then they did what was right; when they told

me to dance with all these motions that are here then I danced. From that time all the Indians became proud, and called themselves cheifs.

On another subject I have something else to say. Now how are we here as a post? From what you have said I think you intend to win our country, or how is it to be? In one day the Americans become as numerous as the grass; this I learned in California; I know that is not right. You have spoken in a round about way; speak straight. I have ears to hear you and here is my heart. Suppose you show me goods shall I run up and take them? That is the way we are, we Indians, as you know us. Goods and the Earth are not equal; goods are for using on the Earth. I do not know where they have given lands for goods.

We require time to think, quietly, slowly. I see Americans in all countries, it is not the country to think about, we may think about another; there is the Mission [Catholic Mission] it is right there and it is right it should be there. You have spoken in a manner partly tending to Evil. Speak plain to us, I am a poor Indian, show me charity; if there was a cheif among the Nes-Perses or Cayuses, if they saw evil done they would put a stop to it and all would be quiet; Such cheifs I hope Gov. Stevens and Gen'l Palmer are. I should feel very much ashamed if the Americans should do anything wrong. I had but a little to say, that is all. I do not wish you to reply today; think over what I have said.

Com-os-pi-to- said in substance as follows, it was addressed to his people and rendered by the Interpreters after the conclusion of his speech.

He reproved the young men for laughing and talking; said they considered him of no account any longer; they had knocked off his horns and his teeth were worn out; once he had horns and he could hook; teeth and they were sharp and he could bite; you young men think yourselves very smart by and by you will learn; now I am tired of your conduct; I am not speaking to Gov.
216 Stevens or Gen'l Palmer, I am speaking to you young men, as my children, to listen and behave yourselves.

Gov. Stevens said: We are ready to hear, my friends anything you have to say today. If you desire not to speak today the council will adjourn till Monday. We do not wish to speak on Sunday because our Great Cheif does not want us to do business on that day, unless it is a matter of necessity. We think that most of our red brethren do not wish to do business on Sunday. The Council is adjourned till Monday at 10 A. M. And the Indians then dispersed at 3 P. M.

June 4th at 12½ P. M. the Indians began to collect and 1½ P. M. the council opened.

Gov. Stevens said: Pee-o-pee-mox-a-mox said on Saturday, he had listened patiently to all we had said, and hoped we would listen patiently when any Indian spoke. We listened patiently on Saturday, we shall listen patiently today; we want you to open your hearts and speak freely.

After a long pause the Lawyer said. If you will designate some one to speak first he will speak. If you do not they will sit here all day without speaking.

Gov. Stevens said: We expect the Head Cheifs know the hearts of their people. We will be glad to hear the Lawyer speak.

The Lawyer said: My Cheifs and people, I will not speak, listen (to Commissioners). I ask good for these poor people; I think my cheif about what you have been speaking; it is from the man that made us, My Cheif, or is it from your own people? That is the reason of my asking, where is it from you have spoken My Cheif? Although I think it is from the white people; from where the white people is they have been dying and dying, and are yet dying, and also the whites are living all from the same people. The same thing of our people our red people that are younger and from the same root; and here you see these many of us yet and still living, old men and children.

The Supreme Being our maker listens to the white people who are dead and also to those who are living; the same thing with the red people, they listen to the dead and also the living.

And this what the President has made up his mind for us poor people; he has thought we were a poor people and says go and see them and learn them straight; and that is the reason you have told them you would learn them to read and write and all those other things you have spoken of; and that is the reason I have understood what you have spoken from the President; for that reason you have been asking us questions, and now we are asking questions from you.

It was not for nothing I have been listening to you. My country is poor; it is a trifling country. You see the map the marks of our country, one stream runs one way another runs another way, it is all rock. My Cheif, but the Big Cheif from the light, (the East) said to you go and talk to these people and you have done it, he says go there to take care of your white people and your red people and you have done it. As long as the Earth stands take care of the people; he said to the white people and the red people all as one let us listen to the laws, when the earth is done away with there is the end of the law, and that is the reason you see us good and we see you good.

My Cheif that is all I have to say at the present, there are a good many men here who wish to speak. Let them speak.

217 The Commissioners requested Pe-at-tan-at-tee-miner to speak, who replies. You have heard what I have to say. My mind is the same as the Lawyer has spoken. What I have to say he has said; he has spoken my mind, I have nothing to say, he has said it all, for my land it is for your and for me. I shall do you no wrong and you do me none, both our rights shall be protected forever; it is not for ourselves here that we are talking, it is for those that come that we are speaking. That is all I have to say at this present time.

Cam-i-ah-kun was invited to speak and said, I have something different to say than the others have said. It is young men who have spoken; I have been afraid of the white man, their doings are different from ours. Your cheifs are good, perhaps you have spoken straight, that your children will do what is right, let them do as they have promised. This is all I have to say.

Pee-o-pee-mox-a-mox was next invited and said I do not wish to speak. I leave it to the old men.

Gen'l Palmer said: We do not know who of them desire to speak; let their old men speak if they desire to do so.

Gov. Stevens said: If U-u-Sin-mull-e-cun would like to speak we would be glad to hear him. He replied. I do not wish to speak now let those how have already spoken speak. What the Lawyer has said is my heart, it is not necessary for me to speak.

The Commissioners called upon Staachas to speak who said, how is a cheifs language? How is the Big Cheif talk? Where has their talk sprung from? That they have spoken straight on the part of the Indians; the Lawyer although young has spoken well for me. Who is it that is going to speak straight for all of us. Now I want the whites and the Indians to show all their hearts; you know and we all know life while we are living, and I ask you my friends to speak straight and plain to us, as if I spoke to the President I say Yes. I would wish that the President was here so that we might all listen to him; he would enlighten us, he would give us life, he would make us to live as we ought to live, we would give each other our hands to hold always.

Lawyer spoke first and he will have more to say about this we are now speaking of. Lawyer has asked you to speak plain. I make the same request. I have nothing more to say.

Pee-o-pee-mox-a-mox said: I do not know what they (the Interpreters) have said. My heart was heavy, my heart has to separate so, that was my heart. I do not know for what lands they (the Interpreters) have spoken. If they had mentioned the lands that had spoken of them I should have understood them. Let it be as you propose so the Indians have a place to live, a line as though it was fenced in, where no white man can go.

If you say it shall be so then all these Indians will say yes. Although that you have said the whites are like the wind; you cannot stop them, you make good what you have promised.

You have spoken for lands generally. You have not spoken of any particular ones, your words are here (at this place). If you spoke as the watch goes, then we would say yes; the manner in which you have addressed the whole of us has made my heart heavy. I had nothing to say: I like you Americans; and I like the Hudson Bay Co. people, by which means I am led this way and that way; I do not know as yet what lands these Indians have spoken for but when they mention the lands then I shall know.

218 Fah-hah-tail-pilp or the Red Bear said: I am not ashamed of any of my friends, for why should I be ashamed? If there was something above that I should be ashamed of, then I should be ashamed; I am not ashamed of any people that are sitting around, we have spoken here with our brothers. This is the first time I have ever seen my brothers here.

I like your talk very much as I have heard it, and that is the reason I have listened to you well. And here where we see each other face to face we will talk straight. We shall know if you shall like my talk that I am now talking as I have like yours. I wonder if we shall both tell the truth to each other.

This is what I think my Brothers, that one time more we will talk, we will not say yes from what has yet been said.

Now my younger brother there will speak. Being thus called upon.

Tip-pee-il-lan-ah-cow-pook, or the Eagle from the Light arose and said: Yes my friends you see where the Sun is. He hears me. It is from beyond where the Sun is that sent you here to talk.

The red people are put on this earth. A white man was sent on this earth from the Light (meaning the East). The red man was sent from the West, and now the big chief from the Light has sent his talk here to the red people.

The President has spoken to me through you and I hear it. He like us. He has fixed places for us to sit on and love one another. And I also like the white people as the President likes us.

On a road ready finished, he has sent you here. Look at the face of the earth, there is a road to travel on. Roads up the valleys and roads on to the end of the earth. From the time you started, you found a road till this time.

You are now come to join together the white man and the red men.

And why should I hide anything? I am going now to tell you a tale. I like the President's talk; I am glad of it when I hear it here and for that reason I am going to tell you a tale.

The time the first white men ever passed through this country, although the people of this country were blind, it was their heart to be friendly to them. Although they did not know what the white people said to them they answered yes, as if they were blind. They traveled about with the white people as if the people that said that had been lost, and these lost people said to them; yes.

I have been talked to by the French and by the Americans, and one says to me, go this way, and the other says go another way; and that is the reason I am lost between them.

A long time ago they hung my brother for no offence, and this I say to my brother here that he may think of it.

Afterwards came Spalding and Whitman. They advised us well and taught us well, very well. It was from the same source, the Light (the East). They had pity on us and we were pitied. And Spalding sent my Father to the East—the states—and he went. His body was never returned. He was sent to learn good counsel and friendship and many things. That is another thing to think of.

At the time, in this place here, when there was blood spilled on the ground, tho there was blood upon the earth we were friendly to the whites and they to us. At that time they found it out that we were friends to them. My Cheif, my own cheif said, I will try to settle all the bad matters with the whites and he started to look for counsel to straighten up matters; and there his body lies, beyond here. He has never returned.

219 At the time the Indians held a grand Council at Fort Laramie. I was with the Flatheads and I heard there would be a council this side, next year. We were asked to go and find counsel, friendship, and good advice. Many of my people started and died in the country. Died hunting what was right. There was a good many started there on Green River, the small-pox killed all but one. They were going to find good counsel in the East; and here I am looking still for counsel, and to be taught what is best to be done.

And now look at my peoples' bodies scattered everywhere hunting for knowledge, hunting for someone to teach them to go straight.

And now I show it to you, and I want you to think of it. I am of a poor people.

A preacher came to us, Mr. Spalding. He talked to us to learn, and from that he turned to be a trader, as though there was two in one, one a preacher and the other a trader. He made a farm and raised grain and bought our stock, as though there was two in one; one a preacher the other a trader.

And now from the East has spoken and I have heard it. And I do not wish another preacher to come and be both a trader

and preacher in one. A piece of ground for a preacher, big enough for his own use, is all that is necessary for him.

Look at that, it is the tale I had to tell you, and now I am going to hunt friendship and good advice.

We will come straight here—slowly, perhaps—but we will come straight.

Gov. Stevens said: My brother, if any of you wish to speak today, I will still be silent. Is there anyone who wishes to speak now? If not, I will go on. We have listened to you carefully. We think we know your hearts.

You are willing to make a bargain. You want to know exactly the terms. We have promised mills, shops, schools, teachers, farmers, and all the other things for a term of years. You want to know how many years. We have promised you as the other part of the payment clothing for yourselves, your wives, and your children; tools and implements for your farms and shops and articles for your house.

You want to know how much clothing. How many implements and tools and articles for your farms, your shops, and your houses; and how many years will you have them?

Before I answer that, I will answer *answer* another question which you have asked me. You want to know where your Reservations are to be. What is the ground we have in view for you. I will explain this matter freely.

Here are Nes Perses, Cayuses, Walla Wallas, Yakamas, and Umatillas and bands on both sides the Great river to below the Dalles. Tribes northwards: Colvilles, O-kin-a-kuns, Palouse.

For the principal tribes here present, we have thought of two Reservations. One Reservation in the Nes Perses country and one in the Yakama country. The Reservation in the Nes Perses country, to extend from the Blue Mountains to the spurs of the Bitter Root, and from the Palouse river to part way up the Grande Ronde and Salmon River.

On this Reservation we wish to place the Spokanes, the Cayuses, the Walla Wallas, as well as the Nes Perses, and also the Umatillas. That will be something for them to think about to see whether they can agree to it.

The Yakama Reservation to extend from the Attannua river—to include valley of the Pisco river—and from the Yakama river to the Cascade Mountains. On this Reservation we wish to place the Colvilles, O-kin-a-kunes, Palouse, Pesquouse, Klit-a-tats, and the bands on the north side of the river below the Walla Wallas as far as the Kuth la poddle river, neat the Cowlitz. All these as well as the Yakamas on that Reservation.

There is a third Reservation East of Mr. Jeffersons which will be explained to you by Gen'l Palmer; there it is proposed to place the bands below the Umatillas.

We want you to think about this and see if you like it You may think the Reservations are not good. If not you will say so. The Cayuses, the Walla Wallas, the Umatillas, may prefer the Yakama to the Nes Perses Reservation, and they may not like either.

I will give briefly the reason for selecting these two Reservations. We think they are large enough to furnish each man and each family with a farm, and grazing for all your animals. There is especially in winter grazing on both Reservations. There is plenty of Salmon on these Reservations, there are roots and berries. There is also some game. You will be near the Great Road and can take your horses and your cattle down the river and to the Sound to market.

Though near to the great roads, you are a little of from them, and you will not be liable to be troubled by travellers passing through.

We can better protect you from bad white men there. We can better prevent the trader and the preacher all in one man going there. We can better prevent bad men telling you to dance, and cheating you with lies. We can better stop the theif who comes to steal your horses Your horses will be saved to you and there will be no theives to throw into hell-fire.

You may ask, why so many tribes on one Reservation, and how is it proper to place them on the Reservation?

We want as many tribes together as can be taken care of by one agent. We can do more with the same means; this is a matter I wish to explain fully, and also about the payment in clothing, etc., which I mentioned in the first part of what I said, I will speak no more today, but speak tomorrow. Think over what I have said and hear the rest tomorrow.

Gen'l Palmer said: I shall say nothing to you tonight. You have been sitting a long time and you are tired. We want you to come tomorrow morning early. We want you all to come. You have heard but part, we want you to hear the whole, and when you hear all I think you will say it is good. I have nothing more to say tonight.

The Council then adjourned at 6 P. M.

June 5th—Tuesday

The Indians began to collect at 11½ A. M. and at 12 M. the Council opened.

Gov. Stevens said: My Children, I stated yesterday that we wished to place you on two Reservations and that as regards the

tribes below the Umatillas. There was a third Reservation which would be explained by my brother, Gen'l Palmer. I stated we wanted as many tribes as could be taken care of by one agent.

I will now explain this matter more freely. We wish to put the Spokanes, the Nes Perses, the Walla Wallas, the Cayuses, the Umatillas on one Reservation in the Nes Perses country.

221 Here [showing a draft on a large scale] is a map of the Reservation. There is the Snake river. There is the Clear Water river. Here is the Salmon river. Here is the Grande Ronde river. There is the Palouse river. There is the El-pow-wow-wee.

We commence where this river, the Palouse, comes from the mountains, and down the river to the mouth of the Ti-not-pan-up, then to the Snake river 10 miles below the mouth of the El-pow-wow-wee, then to the source of the El-pow-wow-wee, thence along the crest of the Blue Mountains to the Grande River below the Grande Ronde, thence along the ridge between the Wall-low-low river crossing the Snake river 15 miles below the mouth of Powder river, thence to the Salmon river a little above the crossing, thence by the spurs of the mountains to the source of the Palouse river at the place of begin'ing.

This is a large Reservation. The best fisheries on the Snake river are on it; there are the fisheries on the Grande Ronde river. There are fisheries on the Os-ker-wa-wee, and the other streams. There are cumash grounds here at this place [pointing to the large cumash grounds of the Nes Perses]. We feel if we put you on this Reservation our agent can visit you all and take care of you all.

Each tribe will have its own place on the Reservation. The Spokanes will have their place and their home. The Nes Perses their place and their home. The Walla Wallas their place and their home, the Cayuse and the Umatillas their place and their home.

The Spokanes will have a blacksmith, a school, and a farmer. The Walla Wallas will have a blacksmith, a school, and a farmer. The Cayuses and Umatillas will have a blacksmith, a school, and a farmer. The Nes Perses are more numerous, they will have two blacksmiths, two schools, and two farmers.

These schools are the first schools where your children will learn to read and write. The agent will live in some central place where there will be an agricultural and industrial school common to all the tribes. To this school all the tribes will send such of their children as wish to study more than in the first schools, and to learn trades. Here where the agent lives will be the tinner and the tin shop. There will be one for all the tribes.

There will be the waggon maker and wheel wright; there will be one for all the tribes.

For the four tribes there will be two saw-mills and two flouring mills in proper localities. Thus all the tribes will be on an even footing, and each will have the same provision made for them.

You will see that you will be better taken care of all on one Reservation; each tribe having its own place, then if the Spokanes were on one Reservation with the whites all around them, the Nes Perses on one Reservation with the whites all around them, the Cayuses and Umatillas on one Reservation with the whites all around them.

Here [showing the map] you will be on one Reservation with equal rights under one Agent, and the same provisions for your welfare. But each tribe has its head cheif. A cheif takes care of his people. His people listen to him. He devotes his time, his very life to their good. We want you cheifs to be such men, we expect them to know about you and to see that we do our part. They will not work for themselves, they will work for you. We shall therefore give the Head cheif of each tribe Five Hundred Dollars a year for 20 years to be paid in cash.

We shall build for each Head Cheif a good house to live in. The Agent will have his house and he will be paid. The Head Cheifs shall have their houses and be paid. They will all labor for the good of the Indians.

222 You will be allowed to pasture your animals on land not claimed or occupied by settlers; white men. You will be allowed to go on the roads, to take your things to market, your horses and cattle. You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation.

My friends, I have held four councils on Puget Sound, I have made treaties with all the Indians on that sound. They number more than all the tribes here present. They have agreed, should the President decide, to go on one Reservation. That Reservation is only about one fiftieth part as large as this; they have, however, few horses and cattle. They have not three hundred head. They take Salmon and catch whale and make oil. They ask for no more land. They think they have land enough. You will be farmers and stock raisers and wool growers and you need more.

Now I will tell you the payments that will be made provided you are placed on one Reservation. If you go on different Reservations different provisions will be made. Well, you all go on one Reservation, Spokanes, Nes Perses, Walla Wallas, Cayuses,

and Umatillas; we shall spend a certain amount in moving you onto the Reservation, in breaking up and fencing your farms, in building houses for your cheifs, your sub-cheifs and your people, in cooking utensils for your houses, in milk pans and churns, in a good supply of blankets and clothing. In all these things we will expend for you, One Hundred Thousand Dollars. This will be done the first year you go on the Reservation.

Now if any man gives up a tract of land in going onto the Reservation, he will have the same thing done for him that is done for all the rest and he will have, in addition, his improvements made good to him on the Reservation or the value of them paid to him in cash, as he may desire.

The other payments extend through twenty years. Two Hundred and Fifty Thousand Dollars. We do not want to spend this amount or much of it in cash, and I want my friend Pee-o-pee-mox-a-mox and the other cheifs to listen while I give the reason. I ask all the cheifs to hear my reasons and think of them.

We can furnish you with nearly twice as many goods with the same amount of money as you can get from the Traders. We shall buy the things you want in New York and San Francisco at cheap rates and good articles. The expense of getting them to you will not come out of your money; it will cost you nothing. You now pay Eight or Nine Dollars for a blanket at Fort Walla Walla, we shall furnish you two such blankets for less than that sum, say from six to seven dollars. At For Walla Walla a flannel shirt costs three dollars, we will give you three shirts for three dollars. You pay for a calico shirt at Walla Walla one and a half and two dollars. We can furnish calico shirts for fifty cents a piece. If we furnish the goods therefore, you will get three blankets, three flannel shirts and three calico shirts for the same money you now pay for one blanket, one flanniel shirt, one calico shirt, and have to make a long journey for them besides. We can furnish four hoes for a dollar and a half. You know what you have to pay for a single hoe at Fort Walla Walla and the Dalles. We want the payments to do as much for your good as possible. We don't want half of it to go into the pockets of Traders.

I ask the cheifs to listen to me again.

There will be a certain sum each year for their people. We want them each year to consult their people and tell us what things they want. We want them to make out a list how many blankets they want and what kind of blankets, the number of flannel and calico shirts they want, and so for every article of clothing for their men, women and children. Also the tools

they want for their farms, their house and their shops. In short we want the cheifs to tell us how they want the money spent. The list to be made out every summer for the pay of the next year. If you want part of the pay made in money, we want you to give the reasons and state the sum each year. We will send your reasons to the President and let him decide. There are many of you we would be willing to give a part of the payments in money, but not to the men who drink whiskey, and not to the men who do not take care of their wives and children. Let, therefore, your cheifs each year make out a list of how much money and we will send it to the President.

223 I have now a few words to say in regard to the Yakama Reservation; the same provisions as regards schools, farms, and shops will be made as in the case of the Nes Perses Reservation.

Here is the Yakama Reservation, commencing with the mouth of the Attanum river, along the Attanum river to the Cascade mountains, thence down the main chain of the Cascade mountains south of Mount Adams, thence along the Highlands separating the Pisco and the Sattass river from the rivers flowing into the Columbia, thence to the crossing of the Yakama below the main fisheries, then up the main Yakama to the Attanum where we began.

We propose to place there the Colvilles, the O-kin-a-kunes, and Pisquouse Indians (they now send their cattle and horses there in winter), also the Bands on the Columbia River below the Walla Wallas down to the mouth of the Kuth la poodle river, also the Klicatat around Mount Adams and Mount St. Helens. These Klicatats and these bands on the Columbia originally came from here or further north.

We will give one blacksmith, one farmer and one school for the Colvilles, one of each for the Pisquouse and O-kin-a-kunes, one of each for the Yakamas, one of each for the Yakamas including the Palouses, one of each for the remaining bands. They shall have the agricultural and industrial school as in the other Reservation. They shall have the same mechanics, gun-smith, tin-smith, plough and waggon makers. Their children shall be taught and they shall learn trades like the children on the other Reservation. They shall have the same liberties outside the Reservation to pasture animals on land not occupied by whites, to kill game, to get berries and to go on the roads to market. Payments to be made in the same way as in the Nes Perses Reservation. One Hundred Thousand Dollars to be expended the first year. Two hundred and Fifty Thousand Dollars the next Twenty years.

I need say nothing more. It is designed to make the same provisions for all the tribes and for each Indian of every tribe. The people of one tribe are as much the people of the Great Father as

the people of another tribe; the red men are as much his children as the white men.

We think this plan will be for your good. We want you to think of it. I have tried to talk plain and to speak straight out. My brother will now speak.

224 Gen'l Palmer said: My Brothers, my brother here has said as much perhaps as could be said. He has told you what we desire to do for you; it is for you to say whether you will receive it or throw it away: we have but one heart; he has been speaking of something which interests you; it is the duty of your cheifs and your men to think well of it. It was said by this man (Young Cheif) the other day that we were not acting wholly for those that are here now, but for those who come after us; it is the duty of a parent to provide for his children. You may not understand all the advantages of the propositions that have been made to you; but they are for your benefit and those who come after you; as a cheif desiring to promote your interests, I say it is good; that I would not deceive you; the Great Spirit who knows the heart of all men knows that I desire to promote your good.

We expect it will take at least two years to prepare these reservations for you to go onto. If we make a bargain and sign the papers, my Brother and myself and all the Head Cheifs and Head men, that paper must go to Washington. Our Cheif and his council will examine it: if they approve it they say yes, and give us the money to expend in accordance with its provisions.

My brother has stated that you will be permitted to travel the roads outside the Reservation. We have some kind of roads which perhaps you have never seen; we may wish to make one of the roads from the settlements east of the mountains to our settlements here: they may desire to run that road through your Reservation; if we desire to do so we wish that privilege; that kind of road we call a railroad. I will try and explain to you the way in which we make such roads. We first lay on the ground sticks of timber, we then lay other sticks across in that way, unite them together and put a strip of iron on the top of them, we then place a waggon on those tracks and instead of having horses or oxen hitched to the waggon we build a fire; some of you have seen a steamboat; they have on this waggon a boiler filled with water, the fire heats the water and produces steam, which propels the machine. I am unable to explain all the machinery or the way in which it works but they will travel faster than your swiftest horses can run, all the time. If we start from here at Sunrise we can be at Wascopen by the middle of the day. We sometimes attach twenty of those waggons together and one of those Engines draws the whole, they will take waggons enough to draw more people

than are here. We call the waggon in which they have the fire and water a Locomotive: I have rode on those waggons many a time, so have our people here all or nearly all of them. Now if our cheif desires to construct such a road through your country we want you to agree that he shall have the privilege. You would have the benefit of it as well as other people.

We have another improvement that I wish to speak to you about, it is called a Telegraph. We may possibly desire to make such an improvement through your country. We set posts into the ground 15 or 20 feet high, and as far from here as that house; when the posts are set we place a wire on the top about as big as that; this wire extends as far as we wish to make the road if it is 100 or 1,000 miles.

If my brother is at Oregon City and desires to speak to the Great Cheif he speaks to him if the wires extend that far; the man at the other end of the land will know what he says as quick as I who stand beside him; if the instrument which is attached to this wire should be in your country and a man should steal your horse, and you desired to send word to the Willamette Valley, you would tell this man and he would work the machine and the man in the Willamette would understand you had lost a horse, and before the theif could reach there they would know it, arrest him before he came. You may not understand them now, but when you know as much as the white man you will.

Now as we give you the privilege of traveling over roads, we want the privilege of making and traveling roads through your country, but whatever roads we make through your country will not be for your injury.

225 I told you yesterday I would explain to you another Reservation, but that Reservation is for the people who live below here; there are but few of them there; and as I expect to hold a council with them when I return, and as that Reservation does not particularly interest you, I need not explain it now.

Now I want you all to talk among yourselves and think about what has been said to you, and I want you to think of it like men. When you think of it if you say that what we have said is good and that you receive it, you can express it to us and we can soon write out the Treaty.

You are now tired, you have been long sitting, you know our hearts, and if there is anything you do not fully understand before you make up your minds come and inquire and we will explain. If any of you wish to speak now we will listen to you. Or if you can make up your minds so as to give us an answer this evening come and do so and we will be ready to receive it.

Stachas said: My friends I wish to show you my mind, interpret right for me. How is it I have been troubled in mind? If your mothers were here in this country who gave you birth, and suckled you, and while you were sucking some person came and took away your mother and left you alone and sold your mother, how would you feel then? This is our mother, this country, as if we drew our living from her.

My friends, all of this you have taken. Had I two rivers I would be content to leave the one and live on the other.

I name three places for myself, the Grande Ronde, the Touchet towards the mountains, and the Tucannon.

That is all I have to say.

After a long pause——

Gov. Stevens said: My brothers, if you do not feel inclined to speak today, we will come together again tomorrow.

We want all the cheifs and the people to speak freely as Stachus has done. We will think of what Stachus has said. We could give our reasons now but we are all tired. We will tomorrow after you have spoken, state what we think. Come early in the morning and let us see if we cannot agree before night.

The council is adjourned till 9 o'clock tomorrow.

Five Crows said: I am as it were without thinking yet. I require time to think and then I will answer.

Council then adjourned at 4½ P. M.

Thursday, June 7th

Council met pursuant to adjournment—at 12 o'clock—present as before.

Gov. Stevens said: My brothers we expect to have your hearts today, let us have your heart straight out.

Lawyer said: My friends you have been speaking to me a poor people. This Earth is known as far as it extends. This earth has red people on it and it has had as far as it extends. The people are lost, they don't think whose talk has come to us poor people. On the other side of the big water there is a large country. We also know that towards the east there are a great many different kinds of people: there are red people and yellow people, and black people, and a long time ago the people that travelled
226 this country passed on the waters. And there is that country on that other side of the big water and here is this on this side. On the other side of the big waters they have their laws. Yes, that have their laws there. We now hear the laws they have there, and we now know they have those laws there. We also know the white people pass about on the waters as they wish to. I do not know what they find in travelling about on these waters or what

they are hunting, whether it is timber, leaves, grass, or what. It was the Spaniards in that direction that first travelled about in their ships, they were the ones who first discovered this country and it was in that way they travelled to look for things, in that way they travelled when they found this country: the red people that along the shores to the big waters, those were the people, and at this place they landed to see those poor people. At that place the red man started and run off, or a part of them did because they did not know the people who came to see them, and the rest come and met them, there is where the white people first placed their children when they first came into the land. From this country they took back samples of rich earth, of flowers, and all such things; they also reported that there was a country on the other side, and it was peopled and these people reported they had found a country. And it was known that there was a new country found. And one of the head men said. I knew there was a country there before. Columbus the discoverer said Can you make an egg stand on end. Although he tried he could not do it, he did not understand how, it fell over; then Columbus showed them all that he could make it stand, and he did it, he made the egg stand. After they saw it done they could all do it.

Those children that he had placed in this country among the red people, from them the blood ran on both sides; that is when the laws came into this country to those poor people; there were a great many white people came back to that place; that is the reason the red people traveled off further and from that they kept still travelling on further as the white people came up to them and this man's (Delaware Jim) people are from the same people; they have come till they are here to us now, and from that country some central part came Lewis & Clark, and that is the way the white people travelled and came in here to my forefathers. Where they came into our country they named that stream Kooskooski; it was then they knew us poor people. They passed through our country and knew all our country and all our streams, and on their return my forefathers used them well; as well as they could.

From the time of Columbus and from the time of Lewis and Clark we have known our friends; we poor people have known you as brothers although we were a poor people, a people knowing nothing when we first saw the white cheifs Lewis & Clark. From these poor people there were some of them that started in that direction (east) and of these there is only one now living (Spokane Gerry) they went to be taught, they returned after they could see a little and told us about the Great Spirit; they told us the laws for the poor people; they had seen and heard them.

My Chief said our old laws are poor, the new laws we are getting are good laws, are straight. We said there were these laws, the laws of the Commandments; our old laws the laws of our forefathers and the new laws we are getting shown to us and when the French and American traders first came to us they told us there were laws and those laws should be sent to us.

Ellis our Chief spoke strait for the white people, the President has sent you here to us poor people. Yes! the President has studied this and sent you here for our good. That is the reason I said on Monday use us well my Chief we are a poor people.

The Governor has said the President has sent him to take care of his children; it was you that had spoken thus my brothers (Gov. Stevens and Gen. Palmer) I want the President to see what I a poor man has said. I have got your talk here [pointing to his note book] and although a poor man I can look at it from time to time. I can take care of that; my brother, we have been talking a long time and are all tired.

I think on the stream just below where Mr. Craig lives will be a good place for one mechanic or one of the ranches you have shown me. I also think perhaps in the country where I live may be good place for some more of them, in case they were crowded below it would be a good place where I live.

227 Now, my friends, I have spoken; those things that have been talked of, you know. I have shown you my heart. You have said to them all you had to say. I have also given you all I had to say.

There, my friends, I have spoken; those things that have been talked of you know. I have shown you my heart. You have said to them you have said all you have to say. I also have said also all I have to say.

You spoke of a road through my country (the Reserve); it is a bad country to make roads in, but perhaps it may go through; that is the reason I think we have both talked. 'Tis all our talk. Our Father Chief has said take care of one another. There is no reason that I should speak long although I have more to say. That is the reason I say take care of us well; that is all I have to say at this time, my brethren. I will have one word more to say when we are about to part.

Gov. Stevens. We have the heart of the Nez Perses through their Chief; their hearts and our hearts are one. We want the hearts of the other people through their Chiefs.

Young Chief. Us Indians are blind the reason we do not see the earth well; the Lawyer sees clear. The reason that I do not know anything about this ground is I do not see the offer you have made us yet. If I had the money in my hand then I would

see; the country is very large is the reason this land is afraid. I wonder if this ground has anything to say; I wonder if the ground is listening to what is said. I wonder if the ground would come to life and what is on it; though I hear what this earth says, the earth says, God has placed me here. The Earth says that God tells me to take care of the Indians on this earth; the Earth says to the Indians that stop on the Earth feed them right. God named the roots that he should feed the Indians on; the water speaks the same way; God says feed the Indians upon the earth; the grass says the same thing; feed the horses and cattle. The Earth and water and grass says God has given our names and we are told those names; neither the Indians or the Whites have a right to change those names; the Earth says, God has placed me here to produce all that grows upon me, the trees, fruit, etc. The same way the Earth says, it was from her man was made. God on placing them on the Earth telling them to take good care of the earth and do each other no harm. God said: You Indians who take care of a certain portion of the country should not trade it off unless you get a fair price.

I am as it were, blind. I am blind and ignorant. I have a heart but cannot say much; that is the reason the Chiefs do not understand each other right. They stand apart. Although I see your offer before me; I do not understand it. Lawyer understood your offer and he took it. I do not understand it and I do not yet take it. I walk as it were in the dark and cannot therefore take hold of what I do not see. Lawyer sees and he takes hold. When I come to understand your proposition then I shall take hold. I do not know when. 'Tis all I have to say.

Five Crows said: I will speak a few words. My heart is just the same as the Young Chief.

Gen. Palmer. We know no chief among the Walla Wallas but Pe-pe-mux-mux; if he has anything to say we should be glad to hear it.

Pe-pe-mux-mux. I thought these Indians were all the same as one, all alike [beckoning the Indians he said]. Why do you speak to one another? Listern to me. That is the way with your Chiefs, you white people. When you show us something then we think it good, treating us as children, giving us food. I do not know what is strait. I do not see the offer you have made to the Indians. I never saw these things with my father. My heart cried very hard when you first spoke to me, the same as if I
228 was a feather. I flew, then I thought the same as if you were talking to a feather. I thought what will I do? I have seen everything on both sides of the river. You are all talking together; we are all talking together. If you were to separate as we are now and appoint some other time we shall have no bad

minds. Stop the whites from coming up here till after this talk, not to bring their axes with them, the same as if I saw my heart above.

I hope the President will not think I say or mean anything bad, there is no difficulty in sending letters about; this that I have said to you I do not know in what light you have taken it, whether I have spoken straight or wrong. The whites may travel in all directions through my country we shall have nothing to say to them providing they do not build houses on our land. Now I will speak about Lawyer.

I think my friend has given his lands, that is what I think from his words. You hear both of you what I say, it is why that I request another meeting, whenever it shall be. It is not only by one meeting that we can come to a decision. I have listened to you in a friendly way. If you come again with a friendly message from the President I shall see them at this place, tomorrow I shall come to see you, and towards evening I shall go home. You have spoken to us in a friendly way and I speak to you in the same way, slowly. Gov. Stevens and Gen. Palmer I cannot give you a decided answer, perhaps you will not think well of my words. I beg you will leave me in this way for today. Tomorrow I will give you answer. I do not know; that is all I have to say.

Gen. Palmer. I wish to say a few words to these people, but before I do so if Kam-i-ah-kan wishes to speak he can do so.

Kam-i-ah-kan said: I have nothing to say.

Gen. Palmer. I would inquire whether Pe-pe-mox-mox or the Young Chief speaks for the Umatillas. I wish to know if they are of the same heart.

Owhi. I have nothing to say about this land today. God gave us day and night, the night to rest in, and the day to see, and that as long as the earth shall last, he gave us the morning with our breath; and so he takes care of us on this earth; and here we have met under his care. Is the earth before the day or the day before the earth. God was before the earth, the heavens were clear and good and all things in the heavens were good.

God looked one way then the other and named our lands for us to take care of. God made the other. We did not make the other, we did not make it; he made it to last forever. It is the earth that is our parent as it is God is our elder brother. This leads the Indian to ask where does this talk come from that you have been giving us. God made this earth and it listens to him to know what he would decide. The Almighty made us and gave us breath; we are talking together and God hears all that we say today. God looks down upon his children today as if we were all in one body. He is going to make one body of us; we Indians present have listened to your talk as if it came from God.

God named this land to us that is the reason I am afraid to say anything about this land. I am afraid of the laws of the Almighty, this is the reason I am afraid to speak of the land. I am afraid of the Almighty, that is the reason of my hearts being sad; this is the reason I cannot give you an answer. I am afraid of the Almighty. Shall I steal this land and sell it, or what shall I do? This is the reason that my heart is sad.

My friends, God made our bodies from the earth as if they were different from the whites. What shall I do? Shall I give the lands that are a part of my body and leave myself poor and destitute? Shall I say I will give you my lands? I cannot say. I am afraid of the Almighty.

229 I love my life is the reason why I do not give my lands away. I am afraid I would be sent to hell. I love my friends. I love my life, this is the reason why I do not give away my lands. I have one word more to say.

My people are far away they do not know your words, this is the reason why I cannot give you an answer now. I show you my heart, that is all I have to say.

Gov. Stevens. Now will Kam-a-ah-kan and Skloom speak.

Kam-a-ah-kan. What have I to be talking about?

Gen. Palmer. We have listened and heard your Chiefs speak. The heart of the Nez Perces and ours are one. The Cayuses, the Walla Wallas, and these other people say they do not understand us. We were in hopes we would have but one heart. Why should we have more than one heart? The Young Chief says he does not see what we propose to give them. Pe-pe-mox-mox says the same. Can we bring these saw mills and these grist mills here on our backs to show these people? Can we bring these blacksmith shops, the wagons, & tools on our backs to show them at this time? Can we cause farms of wheat and of corn to spring up in a day that they may see it? Can we build these school houses and these dwellings in a day? Can we bring all the money that these things will cost that you may see it. It would be more than all the horses of any one of these men could carry. It takes time to do these things. We come first to see you and make a bargain. We brought but a few goods with us to give you but whatever we agree to give you you will get.

How long will these people remain blind. We came to try to open their eyes, they refuse the light. I have a wife and children, my brother has also a wife and children. I have a good home, fields of wheat, potatoes, oats, peas, and beans. Why should I leave them and come so far to see you? It was to try and do you good but you throw it away. Why is it that you do so? We all sometimes do wrong. Sometimes because our

hearts are bad, and sometimes because we have bad council. Your people have sometimes done wrong. Our hearts have cried. Our hearts will cry, but if you will try and do right we will forget it. How long will you listen to this bad council and refuse to receive the light?

I too love the earth where I was born. I left it because it was for my good. I have come a long way. We ask you to go but a very short distance. We don't come to steal your lands, we pay you more than it is worth. Here is this little valley and the Umatilla valley that affords a little good land, between these two streams and all around it is a parched up plain. What is it worth to you or to us? Not one half of what we have offered for it. Why do we offer you so much? It is because our Chief has told us to take care of his red people. We come to you with his messages to try and do you good. You throw his words behind you. Why do you do it? Because you have listened to bad council.

I told you the difficulties that existed between the whites and the Indians beyond the mountains. If the whites and the Indians live together here as they did there, it would be the same. Our Chief knows this and he sent us here to see you and to talk with you, this we do before there are many whites here.

Pe-pe-mox-mox says "let us part and appoint another day." Before that day would arrive we might have a great deal of trouble. Gold has been found in the country above yours. Our people are very fond of it. When our people hear this they will come here by hundreds, among these who come there will be some bad people, those bad people will steal your horses and cattle. There are but few of you, you cannot prevent it when you are scattered over a great extent of country, you cannot prevent it; but if you are living in these reservations we can protect you and your property. Then why should you refuse to receive our talk and refuse to allow us to protect you? Your refusal to receive it is not such talk as should come from Chiefs desirous of promoting the interest of their people. I want you to think more of this tonight and if you act like wise men I think you will arrive at a different conclusion.

230 We expect to perfect the arrangements with the Nez Perces perhaps tomorrow. We have but one heart, we expect it will always remain so. We want the Walla Wallas, the Cayuses, and the Umatillas to unite with us and have but one heart. We want you to stop your ears against bad council and receive that which is good. We do not come among you as traders, we come bearing the words of our Great Chief. If you refuse to receive it our hearts will be said. Our hearts will be

sorry for these chiefs for we like them. Our hearts will be sorry and bleed for all these old men. Our hearts will be sorry and bleed for these young men. Our hearts will be sorry and bleed for these women and children.

We want to help you to put food into your lodges and homes. We want to help you to get clothes and blankets to cover you from the storm; we want to help you to get arms and ammunition to kill game; we want to open your eyes and give you light that you may see. We want to make you a good people.

Will you receive our talk or will you throw it behind you. My heart will be glad tomorrow if you come and say we are all of one heart.

What I have said is for your good; think of it. I have nothing more to say.

Cam-an-pello. It is true you have mercy on us. I think it is true what you have been saying; if you were to send me into a mountainous country still I would say you have mercy on us. What would I be glad for? I was glad to hear the first talk by the Governor, that was the reason I was glad to hear what they said. I would be very glad if he had said to me stop ever on one side, then I would be glad.

What would I be glad about if I were to take a thing and throw it away? That is the reason my heart cries. If you would show me fine lands and I were to see them then I would be glad and go to them. How do you show your pity by sending me and my children to a land where there is nothing to eat but wood? That is the kind of land up there, that is the reason I cry. Look at my hands! An old man. I have hurt them by hard work: then I ask myself have I labored in vain? What have I to be glad for?

The white man first showed me and aided me in making my garden and every mile I have been laboring. Will God think nothing of the labor I have bestowed on my garden? Do you do this to me in pity? I am really pitiable and therefore I pray night and day till I am tired. I have no books. The missionaries told me if I had no books I had a book in my heart which enabled me to pray to God. They told me in taking water to drink I should think of God, this I have not learned of myself, it is what they have taught me and I keep it. The laws of God are not alone for you, they are for me as well.

Woa-lish-wam-pum. I have got only two things to say. I have listened to your speech without any impression. I did not understand it. I know this. We are the same. You have life and breath you white people; we red people have life and breath. I think the old laws are straight, that they should still exist.

The Nez Perces have already given you their land. You want us to go there. What can we think of that? What is the reason I cannot think of leaving this land to go there? Your words since you came here have been crooked. That is all I have to say.

Gen. Palmer. I desire to say a few words in reply to Cam-an-pello, he says he "is an old man, he has worked hard in his garden." We have said that any man who has a garden or a field and who left it to go to this reservation should have as much improvement made there for him, or be paid for it in money as he chooses. We will go farther and say he shall have a better improvement; it shall have a better fence, be ploughed well. We will not take them there to starve, they shall live better than where they are and if there is not good land enough in the reservation to make them farms we will make it larger.

231 Gov. Stevens said: Although you are all tired, my friends, I must say a few words. My Brother and myself have talked straight. Have all of you talked straight? Lawyer has and his people have. And their business will be done tomorrow.

The Young Chief says he "is blind and does not understand." What is it that he wants?

Stickuss says his "heart is in one of the three places, the Grand Ronde, the Touchet, and the Tu-kan-on."

Where is the heart of the Young Chief?

Pe-pe-mox-mox "Cannot be wafted off like a feather." Does he prefer the Yakama reservation to that of the Nez Perces? We have asked him before, we ask him now—where is his heart?

And Kam-a-ah-kan the great Chief of the Yakimas has not spoken at all. His people have had no voice here today. He is not ashamed to speak—he is not afraid to speak—then speak out.

But Owhi is "afraid lest God be angry at his selling his land." Owhi, my brother, I do not think God will be angry if you do your best for yourself and your children. Ask yourself this question tonight. Will not God be angry with me if I neglect this opportunity to do them good? Owhi says his people are not here. Why did he promise to come here to hear our talk? I do not want to be ashamed of Owhi. Owhi has the heart of his brother Teayass and his people; we expect him to speak straight out.

We expect to hear from Kam-a-ah-kan from Skloom. The papers we will have drawn up tonight. You can see them tomorrow. The Nez Perces must not be put off any longer, their business must be dispatched.

I hope the hearts of all the others and our hearts will agree. They have asked us to speak straight, we have spoken straight. We have asked you to speak straight, but we have yet to hear from you.

Gen. Palmer. This man (How-lish-wam-pum) says the reason he does not want to go to the Nez Perces' country is that they have given it to us. If he and his people go on that Reservation it will belong to them as much as to the Nez Perces. They will all be served alike, every man will have his farm, it will be his.

Pe-pe-mox-mox says we have met as friends; let us say nothing that is bad, let us part friends. We have been friends a long time. I hope we shall always remain friends and as brothers. When we part we will part as friends. Then let us act as friends and as wise men.

Five Crows. Listen to me you Chiefs. We have been as one people with the Nez Perces heretofore; this day we are divided. We the Cayuses, Walla Wallas, and Kam-a-ah-kans people and others will think over the matter tonight and give you an answer tomorrow.

Owhi. Kam-a-ah-kan is the man who is to speak about these lands. I have nothing to say about them. We will settle the matter among ourselfs.

Gen. Palmer. We have heard what Five Crows have said. We want all this people to have one heart, they ought not to have two hearts. Our Great Chief looks upon them all as his children and I hope you will think on what is here said to you.

Gov. Stevens. My friends, we will meet in the morning again, we have to get through the business of the Nez Perces so that they may get home, they have a long journey before them. We shall meet as friends, I hope. Your hearts and ours will be united, I trust. We want every person to come early. If any person wishes to speak, speak now or otherwise we shall meet in the morning.

232 Council met at

Gov. Stevens said: My friends, judging from your faces, I think you see your way clear. The paper of the Nez Perces is nearly ready and soon will be read to them. We expect that the Young Chief, that Pee-Pee-mox-mox and Kamiakan will speak now, and we hope that with them the business may be concluded today. Let us know what they want, we are here for that purpose.

The Young Chief said: We have been tiring one another for a long time. We did not know our hearts, we did not understand each other on both sides, about this country. We have so many horses and cattle in this country is the reason we were troubled. Your marking out this country is the reason it troubles me so and has made me sit here without saying anything. You Americans, your forefathers are dying in your own country, as many of your people are wealthy in stock it requires a large tract to keep them. Those that have large bands of cattle marks each one a tract for himself. The reason why we could not understand

you was that you selected this country for us to live in without our having any voice in the matter. We will think slowly over the different streams that run through the country, we will expose the country and think over it slowly. I cannot take the whole country and throw it to you. If we can agree this country will furnish food for the whites and for us. The whites and ourselves will be compelled to have equal privileges in getting timber from the mountains to build our houses and fences; then we shall love one another. The good of you white people is foremost, the bad is behind, it is the same with us Indians; we keep the bad with us behind us. You embraced all my country; where was I to go, was I to be a wanderer like a wolf. Without a home, without a house I would be compelled to steal, consequently I would die. I will show you lands that I will give you, we will then take good care of each other. The reason for my uneasiness is for my stock which is running all over the country. Perhaps we will be compelled to divide with our stock, one taking one way the other another way, perhaps out there [pointing South] it would be well to draw a line to divide us. This is the reason why I think we should stop a while that we may come to an agreement. We will see when you make another offer whether we can agree to it. Wait, we may come to an agreement when we see your offer, if any people come send good people; those of the settlers who are here now it is well they should stay. I think the land where my forefathers are buried should be mine; that is the place that I am speaking for. We will talk about it, we shall then know, my brothers, that is what I have to show to you, that is what I love, the place we get our roots to live upon (meaning the Grand Ronde). The Salmon comes up the stream—that is all.

Gen. Palmer said: My brothers, when we quit talking yesterday your minds were very much troubled, you were unwilling to go to the Nez Perces reservation. We have thought of your words, The Nez Perces have a great many horses & cattle, you too have a great many horses & cattle, perhaps you might not agree together quite so well: your people appear to be much divided where to go. We asked you to give us your hearts and tell us where it was, the Young Chief (We * * *) has given us his heart, the Grand Ronde Valley. We have thought of the Umatillas. Many of your people died there. It is a good country for your horses and cattle. We desired first to have you go all to one place, but to show you that we wish to do you good I will make you another proposition. I propose to designate for the Cayuses, the Walla Wallas, & the Umatillas—To commence on the Columbia river [this is the Columbia river—pointing to the map] this is the Umatilla river, this is the Agency, this is McKay's place, this is Wild Horse Creek. Now I propose to select

a reservation commencing at the mouth of Wild Horse Creek and running up this creek to the mountains to the head waters of Hou-te-nic Creek, now down that creek till you strike Mr. McKay's claim, now across from his claim to the Umatilla river, then up to the mouth of the Wild Horse Creek, leaving Wm. McKay's claim out of the reservation. This will include all your farms, your houses, and gardens within the reservation. You will have sufficient grazing for your stock and land to make farms but your stock will have the privilege of grazing on any lands not claimed by the whites. If the whites should settle near to the reservation their stock might sometimes go onto the reservation while yours might go off it; if they should do so we would not want you to quarrel about it. We would build at suitable points on the reservation a saw-mill and a flouring mill;
233 we would employ millers to attend them for you for twenty years, and by that time you would be able to attend them yourselves. We will have one blacksmith shop and employ a blacksmith for 20 years; we will have a plow and wagon-makers shop and employ mechanics for that for twenty years; we will have a carpenter and cabinet makers shop and employ mechanics for that for 20 years—we will have at least two school houses and employ teachers for at least 20 years; we will build a hospital and furnish a doctor and medicines for twenty years; we will build a good house for Pee-Pee-Mox-mox, and a good house for the Chief of the Cayuse; we will build a house for Pee-Pee-Mox-Mox's son, we will plow and fence ten acres of land for Pee-Pee-Mox-Mox; we will plow and fence the same for the chief of the Cayuses; we will plow and fence five acres for Pee-Pee-Mox-Mox's son; we propose to do more for him and for his son because he leaves his country and goes to another place. We will give him as soon as he goes down to the Dalles for it $500 in money—we will give him 3 yoke of oxen, wagon and two plows—we also give him some other things which it is not necessary to mention. We give him a salary and also the chief of the Cayuses of $500 a year, in money, this to continue for twenty years—the same as is to be given to the Lawyer, the head chief of the Nez Perces. We give these salaries because they are the head chiefs, and are expected to labor for the good of their people, and in the event of the death of the head chief their successors get the salaries. Now in addition to these things we will expend fifty thousand dollars in the first and second years after the treaty is ratified. This money is to be expended in building houses, opening farms, buying teams and wagons, and paying persons working for them, and in any way that the President may deem best calculated to promote their interests. In addition to this there will be expended for you eight thousand dollars every year for five years,

for the next five years six thousand dollars a year, the next five years four thousand dollars a year, for the next five years two thousand dollars a year—this makes twenty years, and the amount to be expended one hundred thousand dollars ($100,000). This amount will be expended as the President may direct; we should consult you every year as to how you wanted it paid—part in money—part in goods. You will not be required to go onto this reservation till our chief the President and his council sees this paper and says it is good; and we build the houses, the mills, and the blacksmith shop. But we want you to allow the white people to come and settle in the country anywhere outside of the reservation. The President will have this reservation surveyed and marked off, so that every man that has a piece of land will know which is his. You will be allowed to go and catch fish and dig roots the same as the whites; and if any of our people do wrong to you you are not to shoot them, but to go to the Agent. We expect the chiefs to restrain their young men from doing wrong. We have a few goods here for you, those that we give you will be in addition to these payments, we charge you nothing for them. I have given you now my heart; I have offered you more than your country is worth—more than you know how to count. How long will it take you to decide? If you say it is good the papers can be arranged tonight, tomorrow they can be signed; we would then give you these goods and you could go home with a good heart. We have been here a good many days talking—we are all tired; we commenced far apart; it is for you to say now whether we shall come together. This I say to the Cayuses, the Walla Wallas, & Umatillas—those people are all interested; Pee-Pee-Mox-Mox being the first chief I want to hear from him. I have nothing more to say.

Pee-Pee-Mox-Mox said: The young chief has nothing more to say; he has said all he had to say, as if it was I that put obstacles in the way. Our hearts should not be otherwise than one. I have already spoken all that I have to say—I and Gen. Palmer talked this morning. They have already written all that we have said. I spoke this morning about having a little house, a place to sell my cattle on the other side of the Columbia where my cattle range for a trading post when the Americans pass. I have nothing to talk about; I have only a few words more. I said to Gen. Palmer that I desired permission to get fish there while I lived; when I learned that the house is made (meaning the reservation),
then I shall go there: when we have settled all things then
234 you have your presents for these Indians. Now that we have made up our minds if you think proper you may give us some provisions; sometime tomorrow in the afternoon we will go home; you are now tired—that is all I have to say.

Gen. Palmer said: That we have agreed that Pee-Pee-Mox-Mox shall have the privilege of building a house at the mouth of the Yakima and catching fish for five years. I should like to have all the chiefs and head men of the Umatillas, Cayuses, and Walla Wallas and also the name of every man on this paper that the President may see every man's name and know that they have given their consent.

Gov. Stevens said: My friends, I am glad Looking Glass, one of your chiefs, is coming, he is a friend of Kamiakun; we have now got nearly round the circle; our hearts are almost together; I call upon Kamiakun to say whether we shall get entirely around. My friends, Looking Glass is close by—he has come away from the Blackfeet—the buffalo country across the mountains; there is war; here is peace and friendship; let his first glance be upon you sitting here; when he is close by two or three of us will go and take him by the hand and set him down by his chief in the presence of his friend Kamiakun. Let us now have Kamiakan's heart.

235 Kam-i-ah-kan said: The place that I am from there are but few Indians—all have gone to the Calapooya country. Some are at Nisqually and some at Taih—that is the reason I have deferred speaking till I see my Indians. I wish the Americans to settle on the wagon route; we do not confine them to the road; they may settle about the road so that the Indians may go and see them. I do not speak this of myself it is my people's wish. Owhi and Teias and the chiefs. I, Kamiakan do not wish for goods myself. The priest knows me, he knows my heart he knows I do not desire a great many goods. All that I wish is for an Agent, a good Agent who will pity the good and bad of us and take care of us. I have nothing to talk long about. I am tired. I am anxious to get back to my garden. That is all I have to say.

Joseph, Nez Perce: These are my children [looking around]. I see them all sitting there; talking slowly is good. It is good for old men to talk straight; talk straight on both sides and take care of one another. It is not us, it is those of our children who come after us. It is good for the old people to talk together good and straight on account of our children on both sides to take care of each other till the last day, without speaking I am going. It is not anything bad that I am thinking that I am going without speaking, no, it is not anything bad, it is a place to live, a place for our good to live there. Think for year after year for a war away ahead. I wonder what you think if I could see your thoughts. It is not that there is anything bad that I speak. I hear you speaking to my children, and they

have many hearts. I am going without talking and you don't know my talk. At the Grand Ronde I saw my children on both sides; we have been talking and finished your talk; this is all I have to say.

Gov. Stevens said: If anybody wishes to speak we shall be glad to hear them.

Red Wolf said: I have only one or two things to speak. I want Mr. Craig to stay there in the Nez Perce country, and not go away. The reasons why I wish Mr. Craig to stay there is because he understands us, he speaks our language well; when there is any news that comes into the country we can go to him and hear it straight; the same for us when anybody comes to speak to us he will sit down with us and we understand them. It is good for him to stay there to interpret on both sides so that each can understand the other.

Gov. Stevens said: We wish to hear from Scloom, one of the Chiefs of the Yakimas.

Scloom said: What I have to say is about this the earth; it is long since the earth was made and the trees were made to grow out, and there was one there, a very small boy; I do not know what he knew but he took an axe and cut a tree, and marked it as if he has made a watch, he went, he went to the tree and looked up and saw a star, he took a line and measured the land from that tree; all the land he had measured he plowed; about half way on the line he threw the tree across. For this country that he had plowed up he got $800 for each mile. That is the reason the Indians like the place where they have their gardens; for the reason there was such a price paid for them; the land uncultivated where there are no gardens is not worth so much, it might be sold for $40 a mile. Why should I speak a great deal? We are not bargaining for lots; you know your own country above, you select your piece of land and pay a price for it. There it is the same and have choice. My friends, I have understood what you have said; when you give me what is just for my land you shall have it. This is all I have to say.

Gov. Stevens said: I have a word to say in answer to the marks of Skloom. Proposals have been made for the lands of the Yakimas and their neighbors; a place has been pointed out for the Indians to live in; outside of this place the gardens and farms are to be paid for in money at a fair value.
236 The price paid will probably be a good deal more than the price he has mentioned for those gardens. I say to Skloom, we do sell good lands for eight hundred dollars a mile, but not in this country. We do not expect to sell any of this land. Skloom probably knows that. I ask Kamiakan and I ask Skloom, make your own propositions. I also say to Owhi, let

us know what you think your lands are worth and where you want your home. We shall meet again in the morning. I want Kamiakun and his chiefs to make their own proposition. Looking-Glass is coming. We shall meet tomorrow morning.

Saturday, June 9th

The Council was opened at 2 o'clock P. M. When Gov. Stevens said:

My Friend, today we are all I trust of one mind. Today we shall finish the business which brought us together. Yesterday the Yakamas had not made up their minds fully. Today they and ourselfs agree; the papers have been drawn up. A paper for the Nez Perces; they live on one Reservation. A paper for the Walla Wallas, Cayuses, and Umatillas, they have their Reservation on the Umatilla. And a paper for the Yakamas, they have their Reservation. These papers engage us to do exactly what we have promised to do.

My brother explained yesterday to the Walla Wallas, Cuyuses, and Umatillas what would be given in their paper. It has been given to them in the paper.

In the paper for the Yakamas we have included the tribes who acknowledge Kam-i-ah-kan for their head chief. The Piscouse, the Swan-wap-um and Palouse, the Yakamas, and all the Bands on the Columbia below the Walla Walla down to the White Salmon River. They have their reservation and fishing stations which they well know and which I understand is satisfactory.

The Nez Perces have their reservation as was shown them in Council and in the paper everything was set down which was promised them. They all know what was said.

The money, the payment intended for the Nez Perces, the Walla Wallas, the Cayuses, and Umatillas has been divided. We have given two parts or a $150,000 to the Walla Walla, Cayuses, and Umatillas. We have given the Nez Perces three parts or $200,000.

In the Yagkama reservation we have not placed as many tribes as we expected. We have thrown out the Okan-ah-gans and Colvilles and the Tribes below the White Salmon. Their numbers are about the same as the Nez Perces. We have given them the same amount. There is the paper for the Nez Perces [holding it up], here is the paper for the Yakamas. My brother will show the paper for the Walla Wallas, the Cayuses, the Umatillas.

It is stated first in all the papers the Indians who signed the paper, then your lands are described. We have got the descriptions from yourselfs. Then your reservations are pointed out, those you all know.

You will not be called according to the paper to move on the Reservation for two or three years; then is secured to you your right to fish, to get roots and berries, and to kill game; then your payments are secured to you as agreed; then your schools, your shops, and physician and the other things we have promised you are secured; then the salaries, the houses and the ten acre farms of your chiefs are secured to him.

Then there is another article if any of you get into debt then payments cannot be taken for your debts; every Indian must pay his own debts.

Then you promise next to be friendly with other tribes and the whites.

237 Last you are to drink no whiskey and do all you can to prevent others doing it; and also those who drink whiskey will not be paid their annuities.

I have thus given the substance of the different Treaties. Shall it be read over in detail? You have already heard it not once but two or three times. It can be read over Article by Article and the Interpreters can state to you whether it is what you are promised. If there is anyone present who wishes to speak let him do so before we go on with this business. Let Looking Glass speak.

Looking Glass said: I am now going to speak. From those who have been speaking, they have been listening to us from above and from the ground. A long time ago the Great Spirit spoke to my children. I am from the body of my parents and I sat on a good place. The Great Spirit spoke to his children the Laws, will track on the ground strait and after that there have been tracks on my ground and after that the big Chief, the President, his ground was stept on in the same way and for that reason I am not going there to trample on his grounds and I do not expect anyone to tramp on mine.

I have great respect for my friends, he sees your eyes and your hearts, and that is the reason all this people are his children. Why do you want to separate my children and scatter them all over the country? I do not go into your country and scatter your children in every direction.

It is for me to speak for these people my children, that is what I say. The Big Chief speaks to his children and I also speak to my children and tell them what to do; and that is what we are talking about; you see where the Sun is. I never go where the whites are and mix with them and talk with them.

I am already named from above, by the Supreme Being, my heart is with the country. I live upon and head, that is the

reason my heart tells me to say where my children shall go. I want you to look well to what I have shown you.

I want to know if an Agent will stay up in my country?

Gov. Stevens. As long as there are people.

Looking Glass. Will the Agent be there that long to keep the whites from pushing into our country?

Gen. Palmer said: Certainly.

Looking Glass. Will you mark the piece of country that I have marked and say the Agent shall keep the whites out?

Gen. Palmer. None will be permitted to go there but the agent and the persons employed, without your consent.

Looking Glass. It is not for nothing I am speaking to my chiefs. It is to talk strait, it is just as if I were to see the President and talk to him it would be straight, that is just what I want, that you talk straight from the President. Look at my talk. I am going to talk straight. When I hear your talk it goes to my heart. I am not like those people [pointing about] who hang their heads and say nothing. We will have a short talk, not a long one. (After a silence of a few minutes the)

Young Chief said: That is the reason I told the Governor to let it be till another time, till we know what the Looking Glass would say. I heard that Looking Glass was coming.

Governor Stevens. I will say to the Young Chief, let Looking Glass have time to think, he is thinking now in order that he may speak, he will speak straight and from his heart. We will wait now till we have heard Looking Glass speak.

238 Looking Glass. The line of the Cayuse Reservation will be where the trail crosses the Walla Walla, thence in a straight line to the Umatilla below Wm. McKay's house, from thence north of the butte, straight to John Day's River. The reason why that shall be the line is that they want more room for their horses and cattle. (After a pause of a few moments he continued.) By what time will you build the mill?

Gov. Stevens. The year they move on, when the President approves the Treaty.

Looking Glass. Yes! Now we will talk. We have talked before. You said you would send this talk to the President and if he says yes, then it is right. Yes. And I will listen to what the President says and if he says yes, then we will talk.

Billy. This is just putting it off further and making us more tired. You have no pity on us.

Three Feathers. We cannot understand back here. Why don't he speak louder. Looking Glass is speaking, we look upon him as a Chief.

Billy. I thought we had appointed Lawyer our head Chief and he was to do our talking, that is the reason why I have spoken.

Gov. Stevens. I will say to my brother the Looking Glass that everything we say and do is sent to the President. What Looking Glass has said and what I say now goes to the President, but can I send anything to the President unless you agree to it? Can the President act? We have met that we may agree upon something then it goes to the President. The Priest has sent me and my brother to make this very agreement. We must agree upon something then it goes to the President and if he thinks it is good then he approves of it. I ask L. Glass to look upon it and see that it cannot be done any other way.

Gen. Palmer. Our great Chief, the President, directed me and my brother to come here. We have been here 19 days, we have been talking a great deal. That talk has been for your good. We came here to talk straight, we have shown you our hearts, we will not lie to you. Yesterday we made a bargain with the Cayuses, the Walla Wallas, and the Umatillas and the day before with the Nez Perces. The Looking Glass was not here but we did not forget him. We know that when he understands it all he will say yes. This morning we made a bargain with the Yakamas, they with these others all say yes. We expect the Looking Glass and his people will all say yes. We have told these people and it is so said in the paper that their horses and cattle would be allowed to graze outside of the reservation the same as our people when it was not occupied by whites. If we change the line to where he says we would have to stay here two or three days more to arrange the paper. We are all tired. You are tired. Shall we say one thing today and another thing tomorrow?

They have said yes! My heart says yes to the line that was shown yesterday and today. All things will be done as we told you. Shall we do so. My heart says yes. I have nothing more to say.

Looking Glass. Yes! Let it be so.

Eagle from the Light. When I spoke to you before I said that I should speak slowly and I have been thinking about what to say, but I don't know yet what to say. These people have been talking among themselfs as though there was two and when I heard what they had to say I said very well; let us go as two.

Looking Glass. What I showed these people when I came here. I spoke beyond it [referring to the map] and you have said that this talk you would send to the President and he will see it.

You see my body it is not divided, it is one body as these are all my children [pointing about]. They have all got horses and cattle that is the reason I made it larger.

239 I want you to talk plain just like the Light and then I will say yes. That is all I have to say now.

Gov. Stevens. I will ask of Looking Glass whether he has been told of our council. Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the reservation on lands not claimed by settlers, that he can catch fish at any of the fishing stations, that he can kill game and can go to Buffalo when he pleases, that he can get roots and berries on any of the lands not occupied by settlers. He knows what the Reservation is: that we promise him two mills, a saw and a grist mill, two schools and a blacksmith; that we give him a physician, and all the other things that have been spoken of; the people all know it, it has been read over two or three times.

This Reservation is in his own country. I ask Looking Glass is not this talking straight? We send all this to the President and besides this we pay a certain sum of which you all know; we have been looking for him ever since we have been here; Lawyer will recollect that I have been enquiring when will Looking Glass come? We wanted him to come.

Those who go to the Buffalo are all my children. I am going to see the Blackfeet next moon. The Blackfeet had stolen some of his horses, but he got them back again. I heard the story last night. He killed some of their men. I know that Looking Glass wants me to go and make peace in that country. Let us first agree here.

Gen. Palmer. We buy your country and pay you for it and give the most of it back to you again.

Looking Glass. You have said to me that the whites shall not go over that line, none shall go into that country and this you said and it is said: And you will show to the President what we have said.

Gov. Stevens. I understand Looking Glass has consented with the other Chiefs. The papers are now ready to sign; here I will particularly speak to Kamahkan or the head Chief of the Yakamas. Are you ready?

Young Chief. What the Looking Glass says, I say.

Gov. Stevens. I ask you whether you are ready to sign? I stated that whatever the Looking Glass said and we said would go to the President. We agreed upon a line yesterday and the day before. The papers are drawn. We ask are you now ready to sign those papers and let them go to the President.

Looking Glass. That he said yes to his line.

Gov. Stevens. Looking Glass is satisfied with the Nez Perce line, the Young Chief and Pe-pe-mox-mox yesterday agreed to the Umatilla reserve.

Looking Glass. I said yes to the line I marked myself, not to your line.

Gov. Stevens. I will say to the Looking Glass, we cannot agree.

Gen. Palmer. I would say to the Looking Glass, what use is it to purchase his country and give it all back again. We did not come here to talk like boys. We don't wish to part with a misunderstanding.

The Nez Perces, the Walla Wallas, the Cayuses, and the Umatillas agree to the boundaries as we have marked. Do you wish to throw all we have said to you behind you? Shall we like boys say yes today and no tomorrow? Pe-pe-mox-mox, Young Chief, and the Nez Perces say yes! None of their people say no! Why do we talk so much about it? I have done.

Young Chief. The President is your Chief and you do what he tells you.

That is the reason the Looking Glass marked out the line he wanted; he is the head Chief.

Looking Glass. It was my children that spoke yesterday and now I come and hear them speak. I asked my children what was their hurry? They knew that I was coming. Why did they run and speak till I came; that is the reason I marked it bigger. I wanted to talk with you and have you talk with me. And after that your talk and my talk will go to the President.

Gen. Palmer. I will say to my brother that I did not know that he was absent when we made our minds to come here, and set the time. My brother and myself come here and we come a long way. We have been here a long time. We were not in a hurry, these people wanted to go home, they had fields of wheat, and of potatoes, the weeds were growing up, they wanted to go home, there was no one at home to take care of the fields. We have other persons to see besides these.

My brother has to go to the Blackfoot country and make peace. He wanted to say to them: You shall not steal these peoples' horses; you shall not make war upon them; these are the reasons we talk. We talk because our Great Chief told us.

The papers have not been signed, they had not forgotten him nor had we. Shall all our efforts to protect them be destroyed? Shall our talk be thrown away? If the Looking Glass is a Chief I hope he will act as a Chief acts for the good of his people.

If we were to say yes to his line our Chief would say No! but if we shall say the line we have marked we believe our Chief will say Yes. Which will you do, take that line or have it all thrown away? Let us act like wise men and not part without doing good for each other.

Looking Glass. I am not going to say any more today.

Gen. Palmer. If the Nez Perces are not ready they can talk among themselfs and come tomorrow.

If the Cayuses, the Walla Wallas, and Umatillas are ready to do what yesterday they said they would, then the paper is ready for them to sign, and tonight they can get their goods and go home when they please.

The paper is also ready for the Yakamas if they choose to sign it they can do so.

Gov. Stevens. The Council will now adjourn till Monday morning and I trust by that time Looking Glass will have thought the matter over and we will be able to agree.

241 Monday, June 11th

Council opened at 11 o'clock.

Gov. Stevens said: My children, we have met today for the last time. Every man here present has agreed to a treaty in council. The Nez Perc'es agreed to a treaty. Not one man spoke against it. All agreed that the head Chief would speak for you. You were all called upon to speak. I called upon Joseph to speak and he spoke: "I have a good heart," said Joseph, "what the Lawyer says let it be."

The Eagle-from-the-light said: "The head chief Lawyer had spoken so be it."

The Red Wolf said: "What the Lawyer has said be it so, he is our head chief."

Said U-ute-sin-ma-le-kin "my chief has spoken for me." Every man said, I say again, "Lawyer is our chief." "I agree to the treaty." So said the Cayuses, the Walla Wallas, the Umatillas, and the Yakamas. The Young Chief and Stickuss said, "we pledged our words, we agree."

We all expect that you all will do what you promised to do. We don't believe you will break your word and make us ashamed of you. I don't believe we shall have to say to the President, "you have promised and then broken your promise."

No! We know that you will keep your word. First the Nez Perces—I shall call upon Lawyer the head chief, and then I shall call on the other chiefs to sign.

Will Lawyer now come forward. (He then came forward and signed the Treaty.) Now I call upon Looking Glass and Joseph to sign the Treaty. (After they had affixed their names James and the other chiefs and head men put their names to it.)

Gov. Stevens: My Brothers, the Treaties have now all been signed. They will be sent to the President. All the speeches on both sides will be sent to the President. The President will see that everything has been fairly explained and agreed upon between us. He will see that you have all acted like men here. He won't find any fault even with Looking Glass.

Looking Glass came back after a long absence and asked time to look at the treaty. Time was given him to think it over. He was satisfied and we find his name next to his head chief's.

I think the President will approve what we have done. We will let you know when we hear from him, which will be sometime next year.

We have some few presents to give you which will be distributed upon your leaving the ground. They are designed for those who need them most. You will dispose of them in that way.

Thenceforth you will have me for your Great Chief, Mr. Tappen for your Agent, and Mr. Craig for your Interpreter.

The Yakamas will have Mr. Bolon for their Agent. The Walla Wallas, Cayuses, and Umatillas will look to Gen'l Palmer hereafter.

There is another point which I wish to speak about from my heart. It is the Blackfoot Council. My brother, the Looking Glass, knows that we want peace on those Buffalo plains. You all know it. I think I can make peace there.

Nez-Perce's: Nearly one fourth of your people live there. I want some chiefs of courage and character, and one hundred of your braves to go to that council. I say to Lawyer, the head chief, of the Nez Perce's, I would be glad to have him go. I would be glad to have Looking Glass go. Arrange this among yourselfs. I hope and trust that Mr. Craig will go with you.

242 The Cayuses, Walla Wallas, Umatillas, and Yakamas, I would like to have some of them also.

We shall have chiefs and braves from the Flatheads, the Coeurdie Jains, Coo-too-may's and I hope from the Spokanes. The Blackfeet have promised to meet you there in Council and when we meet there will be peace among you. Think this mater over and decide for yourselfs.

Gen'l Palmer: My Brothers, I wish to say a few words before we part. When we came here we didn't know the hearts of your people. We hate been together a long time and have talked a great deal. We have listened to what you have said, and you have listened to what we have said. *Sometimes* you have sometimes been afraid that we were not working for your good. Your willingness to come forward and sign the Treaty is evidence that you have decided that we intended to do you good. We have shown you our hearts and you have shown us yours. We commenced a long way apart but now we are together. We are one. I hope we shall always remain as one and have but one heart.

From this time we expect that we and you will always be at peace. We not only want you to be at peace with all whites but

we want you to be at peace with yourself. We didn't come here to divide you or to induce one to be against another. Why should you be at war with each other? You may live at separate place, but your hearts would be as one and help each other. The chiefs and old men should give good council to their young people. The young men should listen to the old men and be advised by them. The young people should strive to assist the old people. Take care of them. It is the duty of the old people when they see these boys act foolish to council them. It is the duty of all to take care of your women and children, furnish them with food and with clothing.

I say again! Take care of your old people, supply their lodges with provisions, for you will soon be old yourself and will need help.

We expect you will all leave this ground with good hearts and if there are any among you that have bad hearts, advise them to throw them away. If your people are foolish and do wrong it is your duty as chiefs to punish them for it. We shall try and prevent the whites from doing wrong to the Indians, and you must prevent your people from doing wrong to the whites.

The Treaty provides that if an Indian steals the property of the whites it may be paid for from the annuities. It also provides that if your people steal from other tribes it will be paid for in the same way. We also provide that if the whites take the property of an Indian it must be paid for. The Agent who is the proper person to apply to in case an injury is done you and when any of your people do wrong to the whites, then it is the duty of the chiefs to punish the offender. If one does wrong to an individual he is not to redress his own wrong but he is to submit it to the chiefs or his council, or to the Agent and abide by their decision. It is to be hoped that your people will do no wrong. Let us try and prevent it if we can. We expect the chiefs to look to this and if there is any of their people who have stolen property and have it on hand it is my heart they should give it up to the Agent, and the Agent will do all he can to return your property.

We have, my brother, told you that we had a few goods to give you. Your people are not all here to receive them. We have been here a long time and can't remain to see you all. We shall therefore give those goods into the hands of the chiefs and we expect the Head Chiefs to call his chiefs and see them distributed justly.

My Brother, Gov. Stevens, will furnish the Nez Perce's with goods. Mr. Thompson and myself will furnish the Cayuse, Walla Walla, and Umatillas with goods. And when we get through talking the head chiefs of the Cayuses, Walla Walla, Umatilla will go receive the goods and take care of them.

243 We have not got a great many goods but when this paper goes to the President and he says it is good then we will supply you with other goods, and we shall do all things that we have agreed upon. Mr. Thompson will be the Agent for the Cayuses, Walla Wallas, and the Umatillas.

When we part we will all go to our homes with good hearts towards each other. When we have built the blacksmith shops, sawmills, and chiefs home and other things we have agreed to. Then we expect you will go upon the reservation, and when you go and if you leave your little farms and improvements they will be valued and you will be paid for them.

I shall go home with a good heart towards all your people, and I shall be very sorry if I hear your people have done wrong. I have nothing more to say at present.

If any of you have anything to say we are ready to listen to you.

Gov. Stevens: I will say to the Nez Perce's, I hope to visit them in their own country when I come back from the Blackfoot Council. I hope also to visit the Yakamas on my return.

The Cayuses, Walla Wallas, and Umatillas will look to Gen. Palmer hereafter. They will also look upon me as their friend.

Tin-tin-meet-see: I understand you well. We are never the beginners in doing wrong to the whites. All Indians here understood well what has been said. When your white children come into this country they do things at random [to the Indians]. You have heard all that has been said and now let us go home and do right.

244 Eagle of the Light: My forefathers are all dead. I only am left, there is but the encampment remaining, it is good to hear and think of each other. We have heard good words spoken from the President to take care of us poor people well. His children's way you have come here to see. For days our bodies have been together, also the night an also for years, also for winters. You have shown that he likes his red children. I do not want our hearts to come together wrong, but right, and remain so as long as we are a people, and we will stop the bad people on both sides. The Lord will reward us both when our hearts are good that we will look and care for each other. The old and the young will go right and then all will be right—from little could come great difficulties—that is the reason we speak from small things to big ones—that is all at present.

James said: It is not from anything bad that I have not spoken. It is as though the man I speak of is not of the party. When the white people came to my country Mr. See told me when he came there he was coming for good and not for bad. When the

white people come and they would come in great numbers do not do anything bad to them. I have never done bad to them. I wish Mr. Craig to stay with us and hear the Indians speak for he could speak to our people and they could understand him—therefore I wish him to stay.

Red Grizzly said: I like your talk—you talk well. When you have finished I like it still, this you have brought us from the President. I like that talk my friends. From the time I spoke here I have been sick at heart. This man who has just now spoken, he spoke a little longer because he knows how to speak and there is also another who has just come, the Looking Glass, they speak straight and friendly. You have also spoken friendly, and shown them your heart plainly—not that I am a good man that I like it. My heart is glad as though I see your heart when I hear your words. What I have good to speak I have not spoke yet (here he was interrupted by the Indians when the Red Owl said the young chief wished to say that he wanted you to stop the whites from taking their horses or cattle and if my horses go across the line of the reservation which is a small one I do not want these horses and cattle to be taken off because they are over the line).

Gen. Palmer said: My brethren, this man has said from little things grow great ones. It is true, it is so—a single word spoken unkindly leads to a difficulty. It would be better if we always would not do or say bad things, but if little things are done wrong we should try and forget them. I have been told that there are sometimes difficulties among the Indians in reference to their mode of worship. That is a thing that we do not interfere with. We are willing to let the people worship God as they please. We do not say do this or do that. If their heart is to sing or pray and preach it is good, if others say it is not our heart to pray and to preach it is good, but we want all people to be good people. If those who sing and pray think it is good, let them to try to convince others. Talk kindly, treat them kindly and convince them they will do right. Some will worship one way and some will worship another—do not quarrel about it but worship or not worship, we want you to have good hearts. I have done.

Looking Glass Says: As so many are now working, some other time you and I will have a heart. I have a good head and a good heart, by and by we will have a talk.

245 Council adjourned sine die at three o'clock.

We hereby certify the above to be a true record of the proceedings.

JAMES DOTY,
Secty. to Treaties in W. Terry.
WM. C. McKAY,
Secty. to Treaties in O. T.

Approved:
ISAAC I. STEVENS,
Gov. & Supt. W. T.
JOEL PALMER,
Supt. Ind. Affairs for O. T.

246 In the Supreme Court of the State of Washington

[Title omitted.]

Clerk's certificate

STATE OF WASHINGTON,
County of Thurston, ss:

I, Benj. T. Hart, Clerk of the Supreme Court of the State of Washington, do hereby certify that the foregoing is a full, true and correct copy of the Stipulation and Order of the Chief Justice of the Supreme Court of the State of Washington to send the original Statement of Facts and Exhibits to the Clerk of the Supreme Court of the United States, and attached hereto are the said original Statement of Facts and Exhibits.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court this 23 day of July 1941.

BENJ. T. HART,
Benj. T. Hart,

Clerk of the Supreme Court of the State of Washington.

247 Supreme Court of the United States

October Term, 1941

No. 318

[Title omitted.]

Statement of the points on which appellant intends to rely and the designation of the parts of the record to be printed

Filed July 28, 1941

Comes now the appellant and states that the points upon which he intends to rely in this Court in this case are as follows:

I

Appellant adopts his assignment of errors as his points to be relied upon herein which said assignment of errors he repeats and incorporates as a whole herein.

II

Appellant further states that he designates, as the parts of the record which he thinks necessary for the consideration of the said points, all the papers designated in his praecipe, which together constitute the whole of the record as filed.

Dated this 30th day of June 1941.

NATHAN R. MARGOLD,
Solicitor,
Department of the Interior.
KENNETH R. L. SIMMONS,
District Counsel,
Office of the Solicitor, Department of Interior.
Counsel for Appellant.
CHARLES FAHY,
Acting Solicitor General.

[Endorsement on cover:] Enter Attorney General. File No. 45646. Washington, Supreme Court. Term No. 318. Sampson Tulee, Appellant vs. State of Washington. Filed July 28, 1941. Term No. 318 O. T. 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

FILE COPY

JUL 28

No. 318

In the Supreme Court of the United States

OCTOBER TERM, 1941

SAMPSON TULEE, APPELLANT

v.

STATE OF WASHINGTON, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 318

SAMPSON TULEE, APPELLANT

v.

STATE OF WASHINGTON, APPELLEE

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, Sampson Tulee, a Yakima Indian, presents this statement particularly disclosing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon this appeal to review the judgment in the Supreme Court of the State of Washington in the above entitled case affirming appellant's conviction for a misdemeanor in the Superior Court of the State of Washington for Klickitat County.

DATES OF FINAL JUDGMENT BELOW AND OF THIS APPLICATION FOR APPEAL

The case was heard and decided below by the Supreme Court of the State of Washington

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sitting *en banc*. This was the highest court in the state in which a decision could be had; and the judgment affirming appellant's conviction and sentence was dated and has been in force as a final judgment since April 2, 1941. (*Puget Sound Power & Light Co.* v. *County of King*, 264 U. S. 22.) Since this application for appeal is being presented to June 30th, 1941, its timeliness is established under Section 8 (a) of the Act of February 13, 1925, c. 229, as amended. (43 Stat. 936, 940; 28 U. S. C. 350.)

STATUTORY PROVISIONS SUSTAINING JURISDICTION

Section 237 (a) of the Judicial Code of the United States (28 U. S. C. 344 (a)), as amended by the Act of February 13, 1925, c. 229 (43 Stat. 936), by the Act of January 31, 1928, c. 14 (45 Stat. 54), and by the Act of April 26, 1928, c. 440 (45 Stat. 466), provides the statutory basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this case. The clause in the said Section 237 (a) particularly relied on is the one which refers to cases

> where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity * * *.

STATE STATUTE INVOLVED

The state statute, the validity of which is involved, is referred to in the record as Section 5703

of Remington's Revised Statutes of Washington (vol. 7, 1940 pocket supp.) and will for convenience be referred to hereinafter as "Section 5703." This is a codification of Chapter 149 of the Session Laws of the State of Washington of 1937 (1937 Wash. L., pp. 529–534), which, so far as pertinent, provided:

> SECTION 1. That section 51 of chapter 31 of the Laws of 1915 as amended by section 1, chapter 63 of the Laws of 1921 be amended to read as follows:
>
> SECTION 51. Licenses herein required shall be issued to any qualified person, firm, or corporation, by the director of licenses, or his duly authorized deputy, upon the receipt of a lawful application therefor, upon a blank to be furnished for that purpose, accompanied by the receipt of the state treasurer for the required fee, and the director of licenses shall cause to be endorsed on such application the number of the license issued and the date of issue, and transmit the application to the director of fisheries. All applications for licenses shall be filed with the state treasurer accompanied by the proper fees, which shall be respectively as follows:
>
> * * * * *
>
> For each dip bag net license for the taking of salmon on the Columbia River, five dollars ($5.00);
>
> * * * * *

SEC. 2. This act is necessary for the support of the state government and its existing public institutions, and shall take effect March 31st, 1937.

UNITED STATES TREATY INVOLVED

The treaty invoked by appellant is the one concluded June 9, 1855, between the United States and a group of confederated tribes and bands of Indians including the Yakima Tribe and collectively referred to in the treaty as the "Yakima Nation of Indians." This treaty was ratified by the United States Senate on March 8, 1859, and was proclaimed by the President of the United States on April 18, 1859. (12 Stat. 951–956.) It is referred to in the record as the Yakima Treaty of *1855*.

By article I of this treaty, the Indians ceded and conveyed to the United States a vast tract of land described by metes and bounds and consisting of all of the lands which they had been using and occupying from time immemorial. By Article II, however, part of this tract, also described by metes and bounds, was reserved "for the use and occupation of" the Indians. Article X provided for the reservation in a designated area of a second tract not exceeding six square miles to be surveyed and marked out under the President's direction. In net totals, the Indians ceded and conveyed to the United States some 16,920 square miles of land and reserved 1,233 square miles. (See, in defendant's Exhibits 1 or 2, letter of June 14, 1855, from

Governor Stevens to Commissioner of Indian Affairs forwarding treaty of 1855.)

Of the remaining provisions in the treaty only those in the second paragraph of Article III need be referred to here, viz:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

NATURE OF PROCEEDINGS AND RULINGS BELOW

The information originally filed against appellant charged that he had caught salmon at Spearfish, in Klickitat County, with a dip bag net on May 16, 1939, and had "then and there" sold "the same commercially, without first having obtained a license for the taking thereof as required by Section 5703, Remington's Revised Statutes of Washington" (R. T. p. 2). On his arrest, the United States, acting on his behalf as one of its Indian wards, petitioned for a writ of habeas corpus in the United States District Court for the Eastern District of Washington, Southern Divi-

sion. (See Appendix, Ex. B, *infra.*) The state demurred. (See Appendix, Ex. C, *infra*), and the court, after hearing oral argument, dismissed the petition..

Although the court filed no opinion, the petition for the writ and the "findings" recited in the order of dismissal (See Appendix, Ex. D, *infra*), reveal that the questions raised, argued, and decided on the demurrer specifically involved the validity of Section 5703 on the ground of its repugnancy to the Yakima Treaty of 1855 and to the Constitution of the United States.

An appeal was taken to the Circuit Court of Appeals, Ninth Circuit, where, "notwithstanding the desire of both parties for a decision on the merits" (*United States* v. *House,* 110 F. 2d 797, 799), the Court declined to pass on the questions which had been presented as to the validity of Section 5703 if its license requirements were held applicable to the fishing for which Tulee was being prosecuted. The Circuit Court of Appeals considered it improper for federal courts to exercise their jurisdiction on *habeas corpus* to determine the validity of a state statute under a particular interpretation of its provisions before the interpretation had actually been made and applied to the appellant and before he had exhausted the remedies open to him in the state courts. On this narrow ground, the denial of the writ was affirmed. (See Appendix, Ex. E, *infra.*)

The state thereupon amended its information in the Superior Court so that it would show on its face that Tulee was "a member of the Yakima Indian Tribe" and that he had caught salmon "at Spearfish on the Columbia River * * * one of the usual and accustomed ancient fishing places of said Yakima Tribe of Indians as defined in the Yakima Indian Treaty of June 9, 1855 (12 Stat. 951), and off the Reservation of said Indians, * * * and did then and there sell the same commercially without first having obtained a license for the taking thereof as required by Section 5703, Remington's Revised Statutes of Washington" (R. T. p. 4). Tulee demurred on the grounds that the facts charged did not constitute a crime and that the information contained matter which, if true, constituted a legal bar to the action (R. T. p. 6). The demurrer was overruled. (R. T. p. 8), and the case went to trial in the state Superior Court before Judge Stone and a jury.

At the close of the evidence, Judge Stone gave the jury the following instruction, among others, at the request of the state (R. T. p. 18 and S. of F. p. 18):

INSTRUCTION NO. 4

> You are instructed that under the laws of the state of Washington the state has a right to regulate the taking of fish within its boundaries and on streams not included in or bordering upon the Yakima Indian Res-

ervation; and that the defendant, Sampson Tulee, is as much subject to this right of state regulation as if he were not a member of the Yakima tribe when he is fishing on any stream not within or bordering upon said Indian Reservation.

Judge Stone also refused to give the following instructions requested on behalf of Tulee (R. T. p. 15):

INSTRUCTION NO. 1

You are instructed to return a verdict in this case finding the defendant Not Guilty.

INSTRUCTION NO. 2

You are instructed that the Yakima Indian Treaty of June 9, 1855, contains the following provision:

"The exclusive right of taking fish in all the streams, where running thru or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as, also, the right of taking fish at all usual and accustomed places in common with the citizens of the Territory, and of erecting temporary buildings for curing them; * * *"

And that by this treaty provision there was secured to and vested in the members of said Yakima Tribe of Indians a perpetual right of fishing in their usual and accustomed places off the Yakima Indian Reservation without interference in the exercise

of said right by the State of Washington, and that the State of Washington has no right to compel such Indian fishermen to obtain licenses from said state to fish at these usual and accustomed places.

And you are, therefore, further instructed that even though you should find from the evidence, beyond all reasonable doubt, that the defendant, Sampson Tulee, at the time and place alleged in the amended information did catch certain food fish, to wit, Salmon, and did sell the same commercially, without first having obtained a license for the taking thereof as required by section 5703 of Remington's Revised Statutes of Washington, you should, nevertheless, return a verdict of not guilty if you also find from the evidence that the defendant was, at said time, a member of the Yakima tribe of Indians and that the said place mentioned in the amended information was a usual and accustomed fishing place of the said Yakima tribe of Indians, as defined in said Yakima Indian treaty.

Not content with noting a bare exception to the court's rulings on the requests for instructions, one of the counsel for Tulee spread the following statement upon the face of the record (R. S. of F. p. 22):

Mr. SIMMONS. If the Court please, the Jury having withdrawn, the defendant Sampson Tulee, now objects to the Court giving Instruction No. 4 for the following reasons:

1. There is no jurisdiction in this Court nor in the State of Washington over the fishing activities of the Yakima Indians and, in particular, over this defendant, Sampson Tulee, a member of the Yakima tribe of Indians when fishing at Spearfish, the usual and accustomed fishing place as defined by the Yakima Treaty of June 9, 1855 (12 Stat. 951).

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as, also, the right of taking fish at all usual and accustomed places in common with the citizens of the territory, and of erecting temporary buildings for curing them."

2. *That said Statute, namely, Section 5703, Remington's Revised Statutes of the State of Washington, upon which said amended information is based, is unconstitutional and void insofar as it attempts to regulate, control, or restrict fishing at Spearfish, Washington, the location set forth in the amended complaint on file herein by the defendant, Sampson Tulee, a member of the Yakima tribe of Indians.*

3. *By paragraph 2 of Article III of the Treaty of June 9, 1855 (12 Stat. 951), there is allotted to members of the Yakima tribe of Indians and to this defendant, Sampson Tulee as a member of the Yakima Tribe of Indians, the perpetual right to take fish in*

all the streams bordering upon or running through said Reservation as well as at all usual and accustomed places, including Spearfish, Washington, without interference by the State of Washington, or otherwise. [Italics ours.]

4. The fishing activities of the Yakima Indians at their usual and accustomed fishing places as defined by the treaty of June 9, 1855, which would include Spearfish, Washington, the location named in the amended information on file herein, are exclusively under Federal jurisdiction and not the jurisdiction of the State of Washington.

Defendant excepts to the failure of the Court to give Defendant's proposed instruction No. 1 for the reason that it affirmatively appears from the evidence of the plaintiff, state of Washington, that Sampson Tulee caught and sold salmon at Spearfish, Washington, which was the usual and accustomed fishing place on the Columbia River of the Yakima tribe of Indians as defined in the Yakima Indian treaty of June 9, 1855; that Sampson Tulee was not subject in fishing at said place to the regulatory laws of the State of Washington, and the verdict, therefore, should have been directed in favor of the defendant.

2. The defendant excepts to the failure of the Court to give defendant's proposed Instruction No. 2 for the identical reasons given and set forth in support of the defendant's exception to the giving by the Court of its Instruction No. 4.

The jury returned a verdict of "Guilty" (R. T. p. 21) and Judge Stone sentenced Tulee to a fine of $25 and costs (R. T. p. 22). Thereafter, a motion was made on Tulee's behalf for a new trial (R. T. p. 23) and was denied by the court (R. T. p. 24); and after entry of formal judgment and sentence (R. T. p. 22), an appeal was duly taken to the Supreme Court of the State of Washington (R. T. p. 25). The assignments of error filed on appellant's behalf specifically and separately covered each of the rulings which had been made against him in the Superior Court including those with respect to the granting of the state's request for Instruction No. 4 and the refusal to give Instructions Nos. 1 and 2 requested by appellant (R. Ap's Brief p. 8). The state Supreme Court, by a 5 to 3 decision, affirmed appellant's conviction (R. T. pp. 29–50). The majority and minority opinions also are printed in the appendix hereto. (See pp. i–xvi.)

REASONS AND CASES BELIEVED TO SUSTAIN JURISDICTION ON APPEAL

The record as a whole makes perfectly clear that the only genuine controversy throughout all the proceedings in the case at bar concerned the fundamental question whether Section 5703 of the Washington Revised Statutes is invalid on the ground of repugnancy to the Yakima Treaty of 1855 and to the Constitution of the United States if and to the extent that it is construed and

applied to have required appellant to obtain permission from and pay a license fee to the State of Washington if he wished, without thereby subjecting himself to criminal punishment at the hands of the state, to exercise the right which he admittedly had under that treaty to catch salmon at Spearfish, Washington. The present prosecution actually was instituted against Tulee by prearrangement between the state Attorney General, the United States Attorney for the Eastern District of Washington and the District Counsel for the United States Department of the Interior for the very purpose of settling this question (see *United States* v. *House*, 100 F. 2d 797, 801); and, we submit, a sufficient foundation has been laid in the record for the achievement of that purpose through the present appeal. The statement of Tulee's objections to the trial court's instructions and rulings on the requests for instructions to the jury was intended to and did show of record that his objections involved an attack upon the validity of Section 5703, insofar as it was being applied to the exercise of his fishing rights under the treaty of 1855, and not merely a claim of right or immunity under the treaty and the Constitution. Since these rulings were subsequently assigned as error on the appeal to the Supreme Court of the State of Washington, and urged as a basis for reversing the conviction, it is established of record that the validity of the state

statute was drawn in question before the highest court of the state on the ground of its being repugnant to a treaty and to the Constitution of the United States; and since the state Supreme Court affirmed the judgment convicting and sentencing Tulee for a violation of the state statute, its decision necessarily was in favor of the validity of the state statute. Consequently, a sufficient basis exists for an appeal as of right to the Supreme Court of the United States.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282;
Ward & Gow v. *Krinsky*, 259 U. S. 503;
Cudahy Packing Co. v. *Parramore*, 263 U. S. 418;
Asakura v. *City of Seattle*, 265 U. S. 332;
Fiske v. *Kansas*, 274 U. S. 380;
Ohio ex rel. Clarke v. *Deckenbach*, 274 U. S. 392;
Doty v. *Love*, 295 U. S. 64;
James Stewart & Co. v. *Sadrakula*, 60 Sup. Ct. 431.

The majority opinion filed in the state Supreme Court refers expressly to the errors assigned by appellant "upon certain instructions given by the court, and upon the refusal of the trial court to give two instructions which appellant requested," but nowhere mentions *in haec verba* the issue as to the validity of Section 5703. That this was not due to any failure on appellant's part to press the issue on the appeal before that court is indicated

by the following quotation of the opening paragraphs in the brief filed therein on appellant's behalf (pp. 1–2):

QUESTIONS PRESENTED

1. Whether the Yakima Treaty of June 9, 1855, secures and vests in the defendant, as a member of the Yakima Tribe of Indians, and members of the Yakima Tribe of Indians, a perpetual right of fishing at their usual and accustomed places off the Yakima Indian Reservation, which is protected under the 14th Amendment to the Constitution of the United States, without interference in the exercise of this right in any manner, by regulation or otherwise by the State of Washington. The trial court ruled in the negative.

2. Whether the Statute, Section 5703 Remington's Revised Statutes of the State of Washington is void because it violated Paragraph 2 of Article 3 of the Yakima Treaty of June 9, 1855, which provides in part:

"The exclusive right of taking in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the territory, and of erecting temporary buildings for curing them * * *".

in that the enforcement of such Statute violates the rights of the defendant under the Treaty of June 9, 1855, and under the Constitution of the United States of America. The trial court ruled in the negative.

In any event, even a complete failure on the part of the state Supreme Court to mention in its *opinion* the issue thus specifically called to its attention, could not and would not have prejudiced appellant's right to appeal from its final *decision* and *judgment* which, by affirming appellant's conviction for a violation of the state statute, necessarily upheld the validity of that statute in the face of the attack which appellant had levelled against it.

Dorchy v. *Kansas*, 272 U. S. 306, 309;
Cf. Erie Railroad Co. v. *Purdy*, 185 U. S. 148, 154.

SUBSTANTIAL NATURE OF QUESTIONS INVOLVED

I. Section 5703, as construed and applied to appellant by the highest court of the State of Washington, is invalid on the ground of repugnancy to a treaty of the United States

It needs no argument to establish that the United States has power, under the Constitution, to enter into treaties with the Indian tribes and that the Yakima Indian Treaty of 1855, on its ratification by the Senate and its approval and promulgation by the President on April 18, 1859, attained the

same status as a treaty entered into between the United States and a foreign nation. (*Worcester* v. *Georgia*, 6 Pet. 515; *Holden* v. *Joy*, 17 Wall. 211; *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188; *United States* v. *Winans*, 198 U. S. 371.) As is true with respect to any treaty validly entered into by the United States, every provision appropriately included in that treaty became part of the supreme law of the land with the same force and effect as if contained in a law validly enacted by the Congress. (U. S. Const., Art. VI, cl. 2; *Worcester* v. *Georgia*, *supra*; *Holden* v. *Joy*, *supra*; *United States* v. *Forty-Three Gallons of Whiskey*, supra; *Havenstein* v. *Lynham*, 100 U. S. 483; *United States* v. *Kagama*, 118 U. S. 375; *Geofroy* v. *Riggs*, 133 U. S. 258; *United States* v. *Thomas*, 151 U. S. 577; *Asakura* v. *City of Seattle*, 265 U. S. 332.) As such, it could and may have been abrogated, superseded, or modified in whole or in part by a later treaty or act of Congress; and since the provisions in a treaty, unlike those in the Constitution, do not enjoy a higher status than an act of Congress, the Congress also has power to enact laws which violate existing treaties or which abridge or deny the enjoyment of rights or privileges conferred under them. (*The Cherokee Tobacco*, 11 Wall. 616; *Beecher* v. *Wetherby*, 95 U. S. 517; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.)

The same is not true, however, with respect to the state legislatures, which are just as bound by the provisions in a federal treaty as by those in a validly enacted federal statute or in the federal Constitution itself. Consequently, a right or privilege granted under a provision appropriately incorporated into a treaty of the United States is no more subject to violation or impairment by the states than a right or privilege enjoyed under the Constitution or under a validly enacted law of the United States; and it makes no difference whether the treaty preceded or succeeded the admission of the state into the Union or whether or not the subject matter is one which, except for the treaty, would be one normally or even exclusively subject to the regulatory or other powers of the state. (*Georgia* v. *Brailsford*, 3 Dall. 1; *Ware* v. *Hylton*; 3 Dall. 199, 236; *Clerke* v. *Harwood*, 3 Dall. 342; *Hopkirk* v. *Bell*, 3 Cranch 454; *Chirac* v. *Chirac*, 2 Wheat. 259; *Orr* v. *Hodgson*, 4 Wheat. 453; *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464; *Hughes* v. *Edwards*, 9 Wheat 489; *Carneal* v. *Banks*, 10 Wheat. 181; *United States* v. *Forty-Three Gallons of Whiskey, supra; Havenstein* v. *Lynham, supra; Geofroy* v. *Riggs, supra; Blythe* v. *Hinckley*, 180 U. S. 333, 340; *Dick* v. *United States*, 208 U. S. 340; *Johnson* v. *Gearlds*, 234 U. S. 422; *Missouri* v. *Holland*, 252 U. S. 416; *Asakura* v. *City of Seattle, supra; Nielson* v. *Johnson*, 279 U. S. 47.)

The validity of the foregoing well settled principles has not been disputed in the case at bar. There has however been a complete failure to perceive the necessity for applying them due to a misunderstanding as to the nature of the question presented for decision. The state Supreme Court disposed of the case at bar as if it turned on the broad question as to the power of the State of Washington to regulate the fishing activities of the Yakima Indians in the interest of conservation. The court distinguished between fishing by the Indians at places inside or bordering on the reservation and fishing at places outside and away from the reservation. Conceding that the former was not validly subject to state regulation, the court took an opposite view with respect to the latter and on the basis of that general conclusion affirmed appellant's conviction. Thus, the majority opinion states (Appendix, Ex. A, *infra*, R. Tr. p. 30):

> The only question raised upon this appeal is whether appellant, as a member of the Yakima tribe of Indians, was, under the treaty between the United States and the Yakima tribe, entitled to catch fish in the Columbia river, without the territorial limits of the Yakima Indian reservation, without regard to the statutes of the State of Washington covering the taking of food fish from the lakes and rivers within this State.
>
> * * * * *
>
> We are not here concerned with the right of the Indians to take fish from the streams

running through or bordering upon the reservation. We are concerned only with the latter portion of the paragraph of the treaty quoted, which secured to the Indians the right to fish "at all usual and accustomed places, in common with citizens of the Territory."

* * * * *

This court, in the case of *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557, held that the State had no jurisdiction over the Indians, insofar as their right to fish in streams flowing through or bordering upon the Yakima reservation was secured to them by the treaty above referred to.

* * * * *

The minutes of the council between Governor Stevens and the Indians, at which council the treaty was made and executed, constitute a most interesting historical record, and show, as argued by appellant, that Governor Stevens, doubtless in the exercise of the utmost good faith, assured the Indians that the Federal government would faithfully carry out all terms and conditions of the treaty. To this day, the vast domain set apart to the tribe, comprising many acres of rich land, is enjoyed by the members of the Yakima tribe. Under the authorities, however, it must be held that as to the right of the Indians to fish at points without the reservation, which right was secured to them by the treaty "in common with citizens of the territory," such right has been limited by the statutes of the state of Washington govern-

> ing the taking of fish and wild game, and that the decisions of this court hereinabove referred to correctly declared the law, and should be followed in the case at bar.

We submit that the court mistook the question actually presented for decision. The real issue was not whether the state had a general right to regulate in the interest of conservation but whether the particular regulation embodied in Section 5703 could be held applicable to fishing by the Indians at their usual and accustomed places outside of the reservation without thereby impairing the fishing rights "secured to" them under their treaty with the United States. It requires little more than a comparison of the statutory and treaty provisions to perceive the conflict between them if the statute is applied to the exercise of the right guaranteed under the treaty. Under Section 5703, persons desiring to catch fish in the State of Washington are required to obtain special permission in the form of a State license and to pay specified fees to the State for the privilege. The treaty provides:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; * * *

If the foregoing provision means a thing at all, it means that the Indians obtained a right to fish at their "usual and accustomed places" without need of further permission and without need of further payments in addition to the very substantial consideration furnished by them under the treaty itself. The appropriateness of the inclusion of this provision in the treaty has already been established by decision of the Supreme Court of the United States. Speaking with respect to this very provision in this very treaty, that court, in *United States* v. *Winans*, 198 U. S. 371, 383, declared:

> The extinguishment of the Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised.

The sentence referring to the absence of unreasonable restrain upon the state "in the regulation of the right" was a pure *dictum* since no question affecting the regulatory power of the state was at all involved in the case. In any event, it seems

obvious in the case at bar that regardless of what regulatory powers either the United States or the state might conceivably have, those powers could not and would not permit the particular "regulation" contained in Section 5703. That regulation, as interpreted and applied by the state Supreme Court, was, we submit, clearly repugnant to the treaty and therefore invalid.

II. Section 5703, as it has been interpreted and applied to appellant, is repugnant to the federal Constitution because it attempts to regulate a subject matter under the special protection and within the exclusive jurisdiction of the federal government

Under Point I, *supra*, we sought to point out that the very nature of the fishing rights secured to the Indians under the treaty necessarily were inconsistent with and hence precluded the particular "regulations" embodied in Section 5703, even if it were to be assumed that the state has general regulatory power over the fishing activities of the Yakima Indians at places outside of their present reservation. Under Point II, we seek to establish that even if Section 5703 imposed requirements not themselves necessarily repugnant to the rights reserved and guaranteed under the treaty, it would still be invalid as an attempt by the state to regulate a subject matter under the special protection and exclusive jurisdiction of the federal government.

The treaty was entered into between the United States and the Indians at a time when the State

of Washington was not yet in existence. Assuming that there was power to regulate at all (see *United States* v. *Cutler*, 37 F. Supp. 724), that power could have resided only in the federal government. The treaty does not purport to confer any power on the territorial government which it did not already have under existing law; and it is clear that under existing law it had no regulatory power whatsoever over the Indians. On the contrary, its Organic Act (Act of March 2, 1853, c. 90, sec. 1, 10 Stat. 172, 173) provides:

> That nothing in this act contained shall be construed to affect the authority of the government of the United States to make any regulation respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never been passed: * * *

In support of the claim that the treaty nevertheless affirmatively conferred power on the Territory, rather than on the United States, to regulate fishing by the Indians at their "usual and accustomed places" outside of the reservation, the state has contended that at such places, unlike those inside or on the borders of the reservation, the right to fish was secured to the Indians only "in common with citizens of the Territory" and that since fishing by such citizens was subject to regu-

lation by the Territory, fishing by the Indians also became subject to such regulation.

This contention is demonstrably fallacious and has already been rejected by the Supreme Court of the United States in *United States* v. *Winans, supra.* The question there presented and the decision rendered with respect to it are indicated in the following quotations from the court's opinion (198 U. S. 371, 377, 379, 380, 381, 382, 383):

> This suit was brought to enjoin the respondents from obstructing certain Indians of the Yakima Nation in the State of Washington from exercising fishing rights and privileges on the Columbia River in that State, claimed under the provisions of the treaty between the United States and the Indians, * * *
>
> * * * * *
>
> The respondents or their predecessors in title claim under patents of the United States the lands bordering on the Columbia River and under grants from the State of Washington to the shore land which, it is alleged, fronts on the patented land. They also introduced in evidence licenses from the State to maintain devices for taking fish, called fish wheels.
>
> At the time the treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occu-

pancy to certain lands and to definite rights outside of them.

The pivot of the controversy is the construction of the second paragraph. Respondents contend that the words "the right of taking fish at all usual and accustomed places *in common* with the citizens of the Territory" confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the State, and, such being the rights conferred, the respondents further contend that they have the power to exclude the Indians from the river by reason of such ownership. * * *

* * * * *

The remarks of the court clearly stated the issue and the grounds of decision. The contention of the respondents was sustained. In other words, it was decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more. And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice

which looks only to the substance of the right without regard to technical rules." 119 U. S. 1; 175 U. S. 1. How the treaty in question was understood may be gathered from the circumstances.

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the Territory."

As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.

* * * * * *

It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the State upon its admission into the Union. In other words, it is contended that the State acquired, by its admission into the Union "upon an equal footing with the original States," the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could neither grant nor retain rights in the shore or to the lands under water.

> The elements of this contention and the answer to it are expressed in *Shively* v. *Bowlby*, 152 U. S. 1. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the States in and over shore lands were carefully defined, but the power of the United States, while it held the country as a Territory, to create rights which would be binding on the States was also announced opposing the dicta scattered through the cases, which seemed to assert a contrary view.

See, in accord, *Seufort Bros.* v. *United States*, 249 U. S. 194.

The state has not contended that the treaty should be considered as having been entered into for the benefit of the non-Indian citizens of the Territory and conferred on them the same right and entitled them to the same relief that was granted the Indians in the *Winans* case. And in the light of the decision in that case, we submit that it is improper to say that the phrase "in common with citizens of the territory" modifies the word "right". What it really modifies are the words "taking fish"; and the most that can be inferred from its inclusion in the treaty is that the Indians were giving up the right to exclude the whites from fishing on the tracts being conveyed by them to the United States, not that they were sharing their rights with the whites on the same or

equal terms. Therefore it does not follow that because fishing by the whites was subject to regulation by the Territory, fishing by the Indians also was subject to such regulation. *Fishing by the Indians, being secured to them under a treaty of the United States, was under the special protection of the United States and hence subject to regulation, if at all, only by the Congress of the United States. Fishing by the citizens of the Territory was neither secured by a treaty nor under the special protection of the United States, and was therefore freely subject to regulation by the Territory.*

This basic situation was not changed by the admission of the State of Washington into the Union except insofar as the state succeeded to the regulatory power of the Territory over non-Indian fishing activities. So far as concerned Indian fishing activities, the treaty continued in existence and the Indians continued to enjoy the same special protection of the United States under its provisions. (See *United States* v. *Winans*, 198 U. S. 371; *United States* v. *Sutton*, 215 U. S. 291; *United States* v. *Pelican*, 232 U. S. 442; *Johnson* v. *Gearlds*, 234 U. S. 422; *Seufert Bros. Co.* v. *United States*, 249 U. S. 194.) Such a protective relationship, it has consistently been held by the Supreme Court of the United States, suffices in and of itself to place the property, activity, or other subject matter enjoying the special protection, un-

der the *exclusive* jurisdiction of the United States. (*Worcester* v. *Georgia*, 6 Peters 515; *The Kansas Indians*, 5 Wall. 737; *The New York Indians*, 5 Wall. 761; *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188; *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Thomas*, 151 U. S. 577; *United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Sutton*, 215 U. S. 291; *Clairmont* v. *United States*, 225 U. S. 551; *United States* v. *Sandoval*, 231 U. S. 28; *United States* v. *Pelican*, 232 U. S. 442; *Perrin* v. *United States*, 232 U. S. 478; *Johnson* v. *Gearlds*, 234 U. S. 422; *United States* v. *Nice*, 241 U. S. 591; *Blanset* v. *Cardin, as Guardian*, 256 U. S. 319; *Sperry Oil & Gas Co.* v. *Chisholm*, 264 U. S. 488; *United States* v. *McGowan*, 302 U. S. 535.)

Exclusive jurisdiction does not depend on the place where the property is located or the activity carried on. It exists as to the particular property, activity, or other subject matter under federal protection even though no Indian reservation is involved and even though the place and subject matter would have been subject to state power and law except for the federal protective interest therein, evidenced through the treaties or laws of the United States. (*The Kansas Indians, supra; United States* v. *Forty-Three Gallons of Whiskey, supra; United States* v. *Thomas, supra; United States* v. *Rickert*, 188 U. S. 432; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *United*

States v. *Pelican, supra; Perrin* v. *United States, supra; Johnson* v. *Gearlds, supra; United States* v. *Nice, supra; Blanset* v. *Cardin, supra; Sperry Oil & Gas Co.* v. *Chisholm, supra; United States* v. *McGowan, supra.*) A similar situation exists even where Indian reservations are involved, but where they are located on territory wholly subject to state jurisdiction except with respect to Indian property and activities carried on there under federal protection. (*United States* v. *McBratney,* 104 U. S. 621; *United States* v. *Kagama, supra; Draper* v. *United States,* 164 U. S. 240; *United States* v. *Celestine, supra; United States* v. *Sutton, supra; Hallowell* v. *United States,* 221 U. S. 317; *United States* v. *Pelican, supra; United States* v. *McGowan, supra.*)

In the case at bar, the state Supreme Court has conceded the absence of state jurisdiction over the fishing activities of the Indians at the fishing places which, though actually outside of the reservation, happen to be located in streams contiguous to its boundaries. We submit that it is equally true with respect to the usual and accustomed places outside the reservation and not contiguous to its boundaries. The protective interest of the United States evidenced in and by the Yakima Treaty of 1855, extends to the fishing activities of the Indians at all these places; and these activities, in accordance with the rule established and applied in the cases just cited,

are therefore under the *exclusive* jurisdiction of the United States. If, as may be conceded, power to regulate them exists at all, it can be exercised only by the Congress and not by the Legislature of the State of Washington.

The decisions in *Ward* v. *Race Horse,* 163 U. S. 504, and *People ex rel. Kennedy* v. *Becker,* 241 U. S. 556, do not militate against the foregoing conclusion. The *Race Horse* case turned on the specially limited nature of a provision in a treaty between the United States and the Bannock tribe of Indians which gave them "the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts." Race Horse, a Bannock Indian, was being prosecuted for an alleged violation of a Wyoming statute committed when he killed elk on unoccupied land belonging to the United States but situated within the boundaries of the state. The Supreme Court upheld the conviction; but it did not do so on the ground that the state had the power to regulate hunting by the Indians even though this was an activity with respect to which the United States was exercising a protective interest, as evidenced by the federal treaty. On the contrary, the court seems to have assumed as a matter of course that hunting by the Indians pursuant to the right provided for in the treaty would

not have been subject to state regulation. At any rate, it certainly neither assumed nor held to the contrary. Relying solely on the limited nature of the right conferred under the particular treaty in question, the court held that it was a right which was intended to be exercised not on all unoccupied lands belonging to the United States, but only on such of them as were not situated inside the borders of any state of the Union. It therefore was a right which necessarily ceased to exist with respect to the unoccupied lands in the Territory of Wyoming as soon as the State of Wyoming was admitted to the Union. Thus, Race Horse was not being prosecuted for an exercise of his hunting rights under the Bannock treaty. The conduct for which the state was seeking to punish him was not covered by the treaty and did not constitute an activity in which the United States was exercising a special protective interest. The essential basis for exclusive federal jurisdiction, therefore, was wholly absent from the case. The narrow limits of the decision are illustrated by the following quotations from the opinion (163 U. S. 504, 507–510, 515–516):

> It may at once be conceded that the words "unoccupied lands of the United States" if they stood alone, and were detached from the other provisions of the treaty on the same subject, would convey the meaning of lands owned by the United States, and

the title to or occupancy of which had not been disposed of. But in interpreting these words in the treaty, they cannot be considered alone, but must be construed with reference to the context in which they are found. Adopting this elementary method, it becomes at once clear that the unoccupied lands contemplated were not all such lands of the United States wherever situated, but were only lands of that character embraced within what the treaty denominates as hunting districts. * * *

To suppose that the words of the treaty intended to give to the Indian the right to enter into already established States and seek out every portion of unoccupied government land and there exercise the right of hunting, in violation of the municipal law, would be to presume that the treaty was so drawn as to frustrate the very object it had in view. * * * It is undoubted that the place in the State of Wyoming, where the game in question was killed, was at the time of the treaty, in 1868, embraced within the hunting districts therein referred to. But this fact does not justify the implication that the treaty authorized the continued enjoyment of the right of killing game therein, when the territory ceased to be a part of the hunting districts and came within the authority and jurisdiction of a State. The right to hunt given by the treaty clearly contemplated the disappearance of the conditions therein specified. * * *

> Indeed, it may be further, for the sake of the argument, conceded that where there are rights created by Congress, during the existence of a Territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission, such continuation will, as a matter of construction, be upheld although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of a limited duration. Indeed, the whole argument of the defendant in error rests on the assumption that there was a perpetual right conveyed by the treaty, when in fact the privilege given was temporary and precarious. * * *

The only bearing which the *Race Horse* decision could have had on the case at bar would, at best, have been limited to the question whether the interpretation there adopted with respect to the treaty provision there involved should be followed in interpreting the treaty provision involved here. As has been seen, this precise question was actually presented for determination in *United States* v. *Winans,* 198 U. S. 371, and the decision in that case, subsequently reaffirmed in *Seufert Bros. Co.* v. *United States,* 249 U. S. 194, definitely established that the admission of the State of Washington into the Union neither abrogated the Yakima Treaty of

1855 nor curtailed the right reserved in the treaty to fish at all their usual and accustomed places outside as well as inside their present reservation. It is true that the opinion in the *Winans* case contains a lone sentence which probably, though not necessarily, was intended to imply the existence of some unspecified state power to regulate the exercise of this right by the Indians. But the question of regulation was in no wise involved in the case. This *dictum* did not change the effect of the court's decision on the real question presented; it cannot reasonably preclude the application of that decision in the case at bar to the extent that the same question is presented here; and it also cannot be regarded as having so conclusively settled the question of state regulatory power not at all presented there, as to preclude its consideration on the merits to the extent that it is presented here.

In *People ex rel. Kennedy* v. *Becker, supra,* the Seneca Nation of Indians in 1797 conveyed certain land in the State of New York to Robert Morris by a grant which reserved "to them * * * and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed." Under an act of Congress in force at the time, it was unlawful for any white person to purchase land from the Indians unless the transaction was approved and ratified through a formal treaty with the United States. It was for this reason that this purely private transaction was

approved and ratified by a treaty with the United States. No land was conveyed to the United States by the Indians under the treaty; nor were any rights guaranteed or secured to the Indians by the United States. All the United States purported to do and did do was to determine that the particular transaction between the Seneca Indians and Robert Morris was not inimicable to their interests and could therefore be given legal effect. The function performed by the United States under this treaty was no different than the function now performed by the Secretary of the Interior whose approval is required before certain types of contracts entered into by the Indians can become effective. Once the approval is granted, the governmental purpose is fully achieved and the governmental interest and function in the transaction ceases. (*In re Sanborn*, 148 U. S. 222, 227; *United States* v. *Algoma Lumber Co.*, 305 U. S. 415.)

This is very different from the situation involved in the case at bar in which the Indians conveyed their land directly to the United States and in which the United States itself undertook a continuing obligation to secure to the Indians the fishing rights reserved for them under the treaty. In the *Becker* case, no such basis existed for establishing that the State of New York was powerless to regulate the fishing by the Indians on the lands conveyed to Robert Morris because the subject matter was under the protective interest and exclusive jurisdiction of the United States; and no

such suggestion was even made on behalf of the Indians. The contention of the Seneca Nation was that by virtue of its agreement with Robert Morris the Seneca Nation had reserved for itself exclusive power to regulate the exercise by its members of the fishing rights reserved under the grant. The opinion in the *Becker* case took special pains to point out the limited nature of this contention; and in deciding against its validity, the court certainly did not foreclose the very different question involved in the case at bar, i. e., the question as to the exclusive jurisdiction, not of the Yakima Nation of Indians, but of the United States, by reason, not of its mere stamp of approval on a conveyance by the Indians to a private person, but of its own participation in the Treaty of 1855 as the contracting party to whom the conveyance was being made and by whom the assurances of continued enjoyment of the reserved fishing rights were being given, and by reason of its consequent continuing protective interest in the exercise and enjoyment of those rights by the Indians.

We submit, therefore, that the state Supreme Court was not justified in the reliance which it placed on the decisions in the *Race Horse* and *Becker* cases.

In conclusion, we invite attention to the fact that subsequent to the decision of the state Supreme Court in the case at bar, the United States District Courts for the Eastern and for the Western Districts of Washington have held, in two cases in-

volving treaty provisions similar to the one in the Yakima Treaty of 1855, that the State of Washington has no power whatsoever to regulate, tax, or interfere in any way with the fishing activities of those Indians pursuant to those treaties at places outside of their reservations. (*Makah Indian Tribe et al.* v. *McCauley, et al.*, Appendix Ex. F, *infra; Quileute Indian Tribe* v. *B. F. McCauley, et al.*, No. 72, Civil, U. S. D. Ct., E. D. Wash., injunction against state officers granted May 5, 1941.)

IMPORTANCE OF CASE

The attempt of the State of Washington to regulate the fishing rights reserved and guaranteed to the Indians of the Yakima Reservation has created a decidedly serious situation. The Indians have such a deep-seated conviction that they have the right to fish under their treaties at usual and accustomed places without state interference that they have threatened to refuse *en masse* to comply with state laws and regulations. It is certain that they will not be satisfied nor will the controversy ever satisfactorily be settled until it is decided by the Supreme Court of the United States. The gravity of the situation led to numerous conferences between representatives of the United States Departments of Justice and the Interior, and of the State of Washington, with the result that the present prosecution was commenced against Sampson Tulee. On the basis of assurances from the United States Attorney for the Eastern District

of Washington that every effort would be made to bring the case speedily to the Supreme Court of the United States, the state officers have held in abeyance prosecutions against large numbers of other Indians who have refused voluntary compliance with the state licensing laws. (See *United States* v. *House,* 100 F. 2d, 797, 801.)

The outcome of the present controversy is of immediate and vital concern not only to some three thousand members of the Yakima Tribe but also to many thousands of Indians in other tribes, particularly the fish-eating tribes of the Northwest, whose treaty fishing rights constitute the very backbone of their tribal economy. (See Article 3, Treaty of December 26, 1854, with Nisqualli, Puyallup, etc., 10 Stat. 1132; Article 5, Treaty of January 22, 1855, with Dwamish, Suquamish, etc., 12 Stat. 927; Article 4, Treaty of January 26, 1955, with S'Klallam, 12 Stat. 933; Article 4, Treaty of January 31, 1855, with Makah, 12 Stat. 989; Article 1, Treaty of June 9, 1855, with Walla Walla, Cayuse, etc., 12 Stat. 945; Article 3, Treaty of June 11, 1855, with Nez Perces, 12 Stat. 157; Article 1, Treaty of June 25, 1855, with Tribes of Middle Oregon, 12 Stat. 963; Article 3, Treaty of July 1, 1855–January 25, 1856, with Quinaielt, etc., 12 Stat. 971; Article 3, Treaty of July 16, 1855, with Flatheads, etc., 12 Stat. 975.)

Suits to enjoin State officers from interfering with the free exercise of the rights under four of the foregoing treaties actually are now pending in the United States courts, and in two of them

injunctions have recently been granted on the basis of sweeping decisions in favor of the Indians (see Appendix, Ex. F, *infra*). These decisions are in conflict not only with State court decisions but also with the decision against the appellant in the case at bar on the *habeas corpus* proceedings in the United States District Court for the Eastern District of Washington. (See Appendix, Ex. D, *infra*.)

In the light of this situation and of the substantial nature of the questions presented on this appeal, it is respectfully submitted that if for any reason the Supreme Court of the United States should conclude that it lacks jurisdiction to review the final judgment of the State Supreme Court by appeal, the court should consent to undertake such a review as if on *certiorari* in accordance with section 237 (c) of the Judicial Code (U. S. C. 344 (c).)

Dated, June 30, 1941.

Respectfully submitted.

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APPENDIX

EXHIBIT A

MAJORITY AND DISSENTING OPINIONS FILED ON THE APPEAL TO THE HIGHEST STATE COURT

In the Supreme Court, of the State of Washington, *State of Washington, Respondent* v. *Sampson Tulee, Appellant.*

No. 28079 En Banc Filed January 13th, 1941

Defendant herein, Sampson Tulee, a member of the Yakima tribe of Indians, was charged by information filed in the superior court for Klickitat county, Washington, with the offense of having, May 6, 1939, caught salmon and food fish with a dip bag net, and with selling commercially the fish which he had caught, all without first having obtained a license to fish, as required by Rem. Rev. Stat. (Sup.), Sec. 5703. Tulee claiming that under the treaty of June 9, 1855 (12 U. S. Stat. 931), he, as a member of the Yakima tribe of Indians, had the right to catch fish as he did, the United States, on behalf of its ward, Sampson Tulee, the defendant, petitioned the United States district court for the eastern district of Washington for a writ of habeas corpus. After due proceedings had, the United States district court held that the right secured to the Yakima tribe of Indians by the treaty

referred to was subject to the paramount and superior right of the state, in the exercise of its sovereign police powers, to reasonably regulate the taking of salmon from the waters within its jurisdiction, and denied the petition for the writ. On appeal to the United States circuit court, that court held that while it had jurisdiction of the case, it was not a proper cause for the exercise of such jurisdiction, and, following the rule laid down in the case of *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, held that the cause should be tried in the state courts, subject to review of any judgment of this court before the supreme court of the United States.

The cause then proceeded before the superior court for Klickitat county on an amended information charging defendant with having caught, at one of the usual and accustomed ancient fishing places of the Yakima tribe of Indians, as defined in the treaty above referred to, certain food fish and salmon, and selling the same commercially without having obtained a license for the taking thereof, as required by the state law. On arraignment defendant entered a plea of not guilty, and demurred to the information on the grounds that the facts charged do not constitute a crime, and that the information contained matter which, if true, constitutes a legal bar to the action. The demurrer was overruled by the trial court, and the action proceeded to trial before the court and jury. Defendant objected to the introduction of any testimony, and moved for a directed verdict of not guilty, his objection and motion having been overruled. The jury returned a verdict of guilty, whereupon defendant moved in arrest of judgment and for a new

trial. These motions having been denied, judgment was entered upon the verdict, and sentence imposed. Defendant was admitted to bail, and appeals to this court from the judgment of guilty and sentence imposed thereon.

Error is assigned upon the overruling of appellant's demurrer to the amended information; upon the overruling of his objections to the introduction of any evidence; upon the denial of his motion for a directed verdict; and upon the denial of his motions in arrest of judgment or for a new trial. Appellant also assigns error upon certain instructions given by the court, and upon the refusal of the trial court to give two instructions which appellant requested.

The only question raised upon this appeal is whether appellant, as a member of the Yakima tribe of Indians, was, under the treaty between the United States and the Yakima tribe, entitled to catch fish in the Columbia river, without the territorial limits of the Yakima Indian reservation, without regard to the statutes of the state of Washington covering the taking of food fish from the lakes and rivers within this state.

During the latter part of May and the first part of June, 1855, the United States, represented by Governor Isaac I. Stevens, who was governor of the then territory of Washington, and also the agent of the United States for dealing with the Indian tribes inhabiting the territory, held a council with the Yakima Indians and other tribes, at Walla-Walla valley, Washington Territory. As the result of this council, the treaty of June 9, 1855, between the United States and the Yakima tribe, was signed. By this treaty the territorial limits of the

reservation assigned to the Yakimas were fixed. The portion of the treaty pertinent to the facts in the case at bar is the second paragraph of article III, which reads as follows:

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them * * *"

We are not here concerned with the right of the Indians to take fish from the streams running through or bordering upon the reservation. We are concerned only with the latter portion of the paragraph of the treaty quoted, which secured to the Indians the right to fish "at all usual and accustomed places, in common with citizens of the Territory."

All treaties with Indian tribes are construed by the courts in favor of the Indians, in an endeavor to exercise toward them the highest degree of good faith, because of the dominant position of the United States government. *United States* v. *Kagama,* 118 U. S. 375; *Choctaw Nation* v. *United States,* 119 U. S. 1; *Jones* v. *Meehan,* 175 U. S. 1; *United States* v. *Winans,* 198 U. S. 371.

At the time of the making of the treaty, the then territory of Washington was largely wild land, sparsely inhabited. The Yakimas were a powerful tribe, and the making of a treaty with them was an important step in the process of establishing orderly government and providing for the settlement of the territory. Fishing was an important part of

the life of the Indians, and the right secured to the tribe to catch fish not only on the reservation but at other accustomed fishing places off the reservation, was then to them a valuable right.

In connection with this treaty, appellant earnestly invites our attention to a certified copy of the minutes of the proceedings of the council above referred to, held between representatives of the United States and various bands of Indians, including the Yakima tribe, which resulted in the treaty of June 9, 1855. Governor Isaac I. Stevens, the senior representative of the United States present, as shown by the minutes of the council, repeatedly assured the Indians that they would not be wronged, that their treaty rights would be protected, and that the provisions of the treaty would be faithfully carried out. The minutes show that on June 5th, Governor Stevens assured the Indians that they would be allowed to go to the usual fishing places and fish in common with the whites.

In the early case of *Johnson* v. *McIntosh*, 21 U. S. 543, the court recognized the rights of the Indians, saying: "All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy."

This court, in the case of *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557, held that the state had no jurisdiction over the Indians, in so far as their right to fish in streams flowing through or bordering upon the Yakima reservation was secured to them by the treaty above referred to.

In interpreting Indian treaties, the rule has been followed that rights not expressly granted by the

Indians are reserved to them. *Winters* v. *United States,* 207 U. S. 564.

On several different occasions this court has considered the question here presented. While admitting the force of our previous decisions, appellant asks that this question be re-examined, particularly in the light of the record of the council between Governor Stevens and the Indians above referred to; the existence of which record was not known at the time the prior cases were decided.

In the case of *State* v. *Towessnute,* 89 Wash. 476, 154, Pac. 805, it appeared that the defendant was charged with violation of the state game laws governing the taking of food fish. The defendant, a member of the Yakima tribe, had caught salmon at a point on the Yakima river several miles outside of the Yakima reservation. The defendant had not procured a fishing license, and had snagged the salmon with a gaff hook, thereby admittedly violating the state game law and rendering himself subject to prosecution, unless the clause of the treaty hereinabove quoted gave him the right to fish at the point on the Yakima river where he had taken the salmon, free from the limitations provided by the statutes of this state. The trial court sustained the defendant's demurrer to the information and dismissed the proceeding. On appeal this court reversed the trial court, holding that the information was good, and that the demurrer thereto was erroneously sustained.

In the case of *State* v. *Alexis,* 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041, the right of a member of the Lummi tribe of Indians under the treaty en-

tered into in 1859 between the United States and the Lummi tribe, to fish outside of the Lummi reservation, was considered. The treaty with the Lummis contained a provision similar to that contained in the treaty with the Yakimas. In the Superior court the defendant was convicted of violating the state statutes regulating the taking of fish, and on appeal the conviction was affirmed, this court, in a short per curiam opinion, stating that the same question was presented as that which the court had just decided in the Towessnute case, *supra*. On petition for rehearing, this court, in a supplemental per curiam opinion, referred to certain testimony introduced before the trial court, which is was contended showed some contemporaneous interpretation of the treaty in favor of the rights of the Indians to fish, and also showed some statements on the part of Governor Stevens referring to the rights of the Indians under the treaty. The court approved the original opinion in the case.

In *State* v. *Meninock;* 115 Wash. 528, 197 Pac. 641, it appeared that four members of the Yakima tribe had been charged with fishing in the Yakima river, in violation of the state fisheries code. The place where the defendants had taken fish was outside the Yakima reservation, but fell within the provision of the treaty with the Yakimas with which we are here concerned. The four cases were consolidated on appeal, and by a decision of this court sitting *en banc*, the judgments appealed from, by which the defendants were found guilty before the superior court, were affirmed.

In the case of *State* v. *Wallahee*, 143 Wash. 117, 255 Pac. 94, the defendant, a member of the Yakima

tribe, was charged with having in his possession, on a date specified, a dead female deer. It was admitted that the defendant killed the deer outside the boundaries of the Yakima reservation, while hunting upon open and unclaimed lands belonging to the United States. The treaty with the Yakimas reserved to the Indians the right to take game on any open and unclaimed government lands. The defendant was convicted before the superior court of violation of the game law, and on appeal the judgment was affirmed.

On behalf of the state of Washington, respondent herein, it is argued that Rem. Rev. Stat. (Sup.), Sec. 5703, providing for the issuance of licenses authorizing the licensee to fish within the waters of this state, is a lawful exercise of the police power of the state in regulating fishing within its borders. Respondent relies upon the proposition that the powers of the Federal government are limited to those granted to it either expressly or by implication in the constitution of the United States, all other powers being reserved to the states. This matter was discussed by the supreme court of the United States in the case of *Prigg* v. *Pennsylvania;* 41 U. S. 539, in which the court used the following language:

"To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be understood, in any manner whatsoever, to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within territorial limits of the states and has never been conceded to the United States."

In the case of *Atlantic Coast Line R. Co.*, v. *Goldsboro*, 232 U. S. 548, is found the following:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

Upon admission to the union, a state assumes all the rights and powers the exercise of which is enjoyed by her sister commonwealths, each state, regardless of the date of its admission to the union, standing on a basis of equality with the other states. *Coyle* v. *Smith*, 221 U. S. 559.

In the case of *Ward* v. *Race Horse*, 163 U. S. 504 (cited in the case of *State* v. *Towessnute*, *supra*), the supreme court had before it for consideration a question very similar to that here presented. The case is of great interest, for the reason that it lays down principles applicable to several phases of the case at bar. It appeared that by the treaty of 1869 between the United States and the Bannock Indians, it was agreed that the Indians

> * * * shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

Prior to the making of this treaty, Congress had established the territory of Wyoming, the act cre-

ating a territory providing that nothing therein contained should impair the treaty rights of the Indians as they then existed. In 1890, Wyoming was admitted to the union, and in 1895 the state legislature enacted a statute regulating the killing of wild game. Thereafter the defendant in the case, one Race Horse, a Bannock Indian, was charged with killing elk upon unoccupied land of the United States, in violation of the state statute. The defendant relied upon the treaty above referred to. The case went before the Supreme Court of the United States by way of a writ of habeas corpus. In the course of the opinion, in which it was held that the defendant could not avail himself of the provisions of the treaty between the United States and his tribe, the court stated:

> The act which admitted Wyoming into the Union, as we have said, expressly declared that that State should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it were so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule * * *.
>
> The power of all the States to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the

State of Wyoming, that State would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the State. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence. Nor need we stop to consider the argument advanced at bar, that as the United States, under the authority delegated to it by the Constitution in relation to Indian tribes, has a right to deal with that subject, therefore it has the power to exempt from the operation of state game laws each particular piece of land, owned by it in private ownership within a State, for nothing in this case shows that this power has been exerted by Congress. The enabling act declares that the State of Wyoming is admitted on equal terms with the other States, and this declaration, which is simply an expression of the general rule, which presupposes that States, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the States already admitted, repels any presumption that in this particular case Congress intended to admit the State of Wyoming with diminished governmental authority. The silence of the act admitting Wyoming into the Union, as to the reservation of rights in favor of the Indians, is given increased significance by the fact that Congress in creating the Territory expressly reserved such rights. Nor would this case be affected by conceding

> that Congress, during the existence of the Territory, had full authority in the exercise of its treaty making power to charge the Territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a Territory it would be also within the power of Congress to continue them in the State, on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the State, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission.

The Race Horse case is strikingly like that here presented. The act of Congress of March 2, 1853 (10 U. S. Stat. 172), providing for the organization of the territory of Washington, contains a provision with respect to treaties with Indian tribes, similar to that contained in the act which organized the territory of Wyoming. In the Race Horse case, the Indian relied upon a provision of the treaty securing to the Indians the right to hunt upon the unoccupied lands of the United States, so long as peace subsisted. In the case at bar, the treaty with the Yakimas secured to them the right to hunt upon open and unclaimed lands belonging to the United States (*State* v. *Wallahee, supra*), in addition to the right to fish at their accustomed fishing places without the reservation. The organic act creating each territory preserved treaty rights enjoyed by the Indians. The enabling acts by which Washington and Wyoming were admitted to the

union, while differing somewhat in wording, are essentially the same.

It has several times been held that the treaty with the Yakimas established in favor of the Indians a perpetual servitude on the lands necessary for their use in taking fish at their accustomed fishing places without the boundaries of the reservation, and that lands conveyed by the United States or by the state are subject to this easement. *United States* v. *Winans,* 198 U. S. 371; *Seufert Bros. Co.* v. *United States,* 249 U. S. 194; *United States* v. *Taylor,* 3 W. T. 88, 13 Pac. 333. There is, then, no dissent to the proposition that under the treaty the Indians are entitled to an easement on, over, and across such lands as they must use in enjoying the full benefit of their fishing rights.

In connection with the question to be here determined, the case of *People ex rel. Kennedy* v. *Becker,* 241 U. S. 556, is of interest. Three members of the Seneca tribe of Indians were arrested by the authorities of the state of New York, charged with having in their possession certain fish in violation of the state conservation law. The defendants contended that as members of the Seneca tribe they were entitled to catch fish as they did, under a treaty made in the year 1797 between the Seneca nation and Robert Morris, which treaty or convention had been made under authority of the United States, and had been ratified by the senate and proclaimed by the president. By the treaty the Indians reserved to themselves and their heirs the privilege of fish-

ing and hunting on the land conveyed. Discussing this right, the court said:

"The right thus reserved was not an exclusive right. Those to whom the lands were ceded, and their grantees, and all persons to whom the privilege might be given, would be entitled to hunt and fish upon these lands, as well as the Indians of this tribe. And, with respect to this nonexclusive right of the latter, it is important to observe the exact nature of the controversy. It is not disputed that these Indians reserved the stated privilege both as against their grantees and all who might become owners of the ceded lands. We assume that they retained an easement, or profit a *prendre*, to the extent defined; that is not questioned. The right asserted in this case is against the State of New York. It is a right sought to be maintained in derogation of the sovereignty of the state. It is not a claim for the vindication of a right of private property against any injurious discrimination, for the regulations of the State apply to all persons equally. It is the denial with respect to these Indians, and the exercise of the privilege reserved, of all state power of control or reasonable regulation as to lands and waters otherwise admittedly within the jurisdiction of the State.

> It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the State (*Geer* v. *Connecticut*, 161 U. S. 519; *Ward* v. *Racehorse*, 163 U. S. 504, 507), subject of course to any valid exercise of authority under the provisions of the Federal Constitution. It is not denied—save as to the mem-

bers of this tribe—that this inherent power extended over the *locus in quo* and to all persons attempting there to hunt or fish, whether they are owners of the lands or others. The contention for the plaintiffs in error must, and does, go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty *quo ad hoc*. As the plaintiffs in error put it: "The land itself became thereby subject to a joint property ownership and the dual sovereignty of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be." We are unable to take this view. It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.

It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing to which the legislation in question was addressed. Adopted when game was plentiful—when the cultivation contemplated by the whites was not expected to interfere with its abundance—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wildlife. But the existence of the sovereignty of the State was well understood, and this conception involved all that

was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. This was clearly recognized in *United States* v. *Winans,* 198 U. S. 371, 384, where the court in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859, said (referring to the authority of the State of Washington): "Nor does it" (that is, the right of "taking fish at all usual and accustomed places") "restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised."

The court cited the Race Horse case, and upheld the authority of the state of New York, as sought to be exercised pursuant to its conservation law.

In the Cherokee Tobacco case, 78 U. S. 616, it was held that under the Federal internal revenue laws, a tax could be imposed upon tobacco grown by members of the Cherokee nation upon lands within the Cherokee reservation, notwithstanding

a provision of the treaty between the United States and the Cherokee nation exempting the members of the tribe from the payment of any tax on farm products, "which is now or may be levied by the United States on the quantity sold outside of the Indian territory." Referring to the conflict between the internal revenue laws and the Indian treaty, the court said: "Undoubtedly one or the other must yield. The repugnancy is clear and they cannot stand together." In the course of its opinion, the court said:

> It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. In the cases referred to these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the

> treaty were not an element to be considered. If a wring has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

It was held that the treaty provisions must yield to the Federal laws providing for the collection of taxes.

In the case of *Bayside Fish Flour Co.* v. *Gentry,* 297 U. S. 422, the supreme court upheld the right of the state of California to proceed under its fish and game code, even though the enforcement of the act indirectly acted as a deterrent to the right to purchase fish taken on the high seas, and might incidentally affect interstate or foreign commerce.

In the case of *Patsone* v. *Commonwealth of Pennsylvania,* 232 U. S. 138, the supreme court upheld a statute of the state prohibiting the killing of wild game by aliens, and held that a citizen of Italy, who claimed exemption from the act by reason of a treaty between the United States and the Kingdom of Italy, by which the citizens of the two nations were assured the enjoyment of certain rights and privileges, was subject to prosecution under the state law, notwithstanding the provisions of the treaty. It was held that no provision of the treaty operated to deprive the states of the exercise of their powers to the full extent.

In the case of *Geer* v. *Connecticut,* 161 U. S. 519, the supreme court considered the rights of the states to control the export of wild game, saying:

> Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people

> which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected.

In the case of State v. Morrin, 136 Wis. 552, 117 N. W. 1006, the supreme court of Wisconsin affirmed a finding of guilty entered against a Chippewa Indian who trapped fish with gill nets, contrary to the state game law. The defendant relied upon a treaty between the United States and the Chippewa Indians, securing to the latter the "right to hunt and fish therein until otherwise ordered by the President." It was held that, pursuant to the Race Horse case and other authorities cited, the treaty did not operate to confer upon the defendant the right to fish in violation of the state game law. The court also observed that the defendant had acquired United States citizenship and was not living on the reservation, and for that reason was not entitled to claim the benefit of any treaty rights. The decision was based upon both grounds.

In the case of People v. Chosa, 252 Mich. 154, 235 N. W. 205, the supreme court of Michigan upheld the right of a state to enforce its game laws against Indians who attempted to hunt and fish on lands which their tribe had ceded to the United States, the Indians claiming such rights under a treaty with the Federal government. It was stipulated

that the defendants were entitled to enjoy "all the treaty rights and privileges" of the treaty. It was held that the defendants were "subject to the game laws of the state, on the lands covered by the treaties, to the same extent as the general public." The court also considered the question of the Indians' citizenship.

Under the authorities, it is clear that the state of Washington enjoys to the full the exercise of its police power, as an equal of the other states making up our Federal Union, including the original thirteen. Under the treaty, the members of the Yakima tribe are entitled to an easement to cross and use lands necessary to the enjoyment of their fishing rights at their old accustomed fishing places. Lands granted by the United States or the state remain subject to this servitude.

The minutes of the council between Governor Stevens and the Indians, at which council the treaty was made and executed, constitute a most interesting historical record, and show, as argued by appellant, that Governor Stevens, doubtless in the exercise of the utmost good faith, assured the Indians that the Federal government would faithfully carry out all terms and conditions of the treaty. To this day, the vast domain set apart to the tribe, comprising many acres of rich land, is enjoyed by the members of the Yakima tribe. Under the authorities, however, it must be held that as to the right of the Indians to fish at points without the reservation, which right was secured to them by the treaty "in common with citizens of the territory," such right has been limited by the statutes of the state of Washington governing the taking of fish and wild game, and that the decisions of

this court hereinabove referred to correctly declared the law, and should be followed in the case at bar.

As observed by the supreme court of the United States in the Cherokee Tobacco case, *supra*, consideration of such a situation as this, if a wrong has been done, pertains to the legislative department of the government, the correction of the wrong, if one exists, being "beyond the sphere of judicial cognizance."

The judgment appealed from is accordingly affirmed.

BEALS, J.

We concur:

MAIN, J.
STEINERT, J.
ROBINSON, J.
JEFFERS, J.

No. 28079

SIMPSON, J., Dissenting: I am unable to agree with the conclusion reached by the majority.

The pertinent provisions of the treaty are contained in subparagraph 2 of Article 3, which reads as follows:

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; . . ."

All Indian Treaties are construed liberally by our courts in good faith and in favor of the Indians, because of the dominant position of the United States. *Worcester* v. *Georgia*, 31 U. S. 515; *United States* v. *Eagama*, 118 U. S. 375; *Choctaw Nation* v. *United States*, 119 U. S. 1; *Jones* v. *Meehan*, 175 U. S. 1; *United States* v. *Winans*, 198 U. S. 371.

In the *Worcester case, supra*, the Supreme Court of the United States said:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word "allotted," in reference to the land guaranteed to the Indians, in certain treaties, indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. *How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.*
>
> The question may be asked, Is no distinction to be made between a civilized and savage people? Are our Indians to be placed upon a footing with the nations of Europe, with whom we have made treaties? The inquiry is not, What station shall now be given to the Indian tribes in our country? but what relation have they sustained to us, since the commencement of our government? We have made treaties with them; and are those treaties to be disre-

garded on our part, because they were entered into with an uncivilized people? Does this lessen the obligation of such treaties? By entering into them, have we not admitted the power of this people to bind themselves, and to impose obligations on us? [Italics mine.]

In the Jones case, *supra*, that court again announced the rule of construction in the following language:

> In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and *that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.* [Italics mine.]

Rights not expressly granted in treaties with the Indians are reserved by them. *Winters* v. *United States,* 207 U. S. 564.

Having this rule in mind, let us view the situation surrounding the making of the treaty of 1855 entered into between the Federal Government and various Indian Tribes of the northwest, including the Yakimas, of which appellant is a member.

The meeting at which the treaty was arranged was held at the Council Grounds in Walla Walla Valley. It started May 18, 1855, and ended June 11, 1855. Governor Isaac I. Stevens of the Territory of Washington and General Joel Palmer of the Territory of Oregon represented the United States Government, and chiefs of the various tribes represented the Indians. Many speeches were made by those present, chiefly by Governor Stevens and General Palmer.

As a result of the treaty, 16,920 square miles of territory were ceded to the United States by the Indians and 1,233 square miles of land were retained by the Indians in two reservations.

Among other things, Governor Stevens told the Indians,

> We have near to our hearts the property of the Indians and the propositions to be made to you will prove it.

Speaking of the tracts to be retained by the Indians, he said:

> On each tract we wish to have one or more schools; we want on each tract one or more blacksmiths; one or more carpenters; one or more farmers; we want you and your children to learn to make ploughs, to learn

to make waggons, and everything which you need in your house. We want your women and your daughters to spin, and to weave and to make clothes. We want to do this for a certain number of years.

Then you the men will be farmers and mechanics, or you will be doctors and lawyers like white men; your women and your daughters will then teach their children, those who come after them to spin, to weave, to knit, to sew, and all the work of the house and lodges, you will have your own teachers, your own farmers, blacksmiths, wheelwrights and mechanics; besides this we want on each tract a sawmill and a gristmill.

At another time he made the following statement concerning the care which the Government would exercise in order to help the Indians:

I have spoken of an agent, I will speak more. If we agree at the council we have many things to do for you; the agent will live with you and see that it is done; if you think we have not done our part go to the agent and tell him so, and he will see that we *do* do it. If we think you have not done your part the agent will go to the chiefs and say so frankly and arrange it with them; he will be your elder brother, and will see that you are not wronged, and that the bargain is carried out.

Again, he stated:

If we make a Treaty with you and our Great Chief and his Council approves it, you can rely on all its provisions being carried out strictly. My heart is that it is wise for you to do so. I will not speak any longer.

Governor Stevens made a definite statement relative to the Indian's right to fish in the following words:

> There is plenty of salmon on these reservations, there are roots and berries. There is also some game. You will be near the Great Road and can take your horses and your cattle down the river and to the Sound to Market * * *.
>
> You will be allowed to go to the usual places and fish in common with the whites * * * together with all outside the reservation.
>
> In the paper for the Kakamas we have included the tribes who acknowledge Kam-i-ah-kan for their head chief. The Piscouse, the Swan-wap-um and Palouse, the Yakimas and all the bands on the Columbia below the Walla Walla down to the White Salmon River. They have their reservation and fishing stations, which they well know and which I understand is satisfactory.
>
> * * * * *
>
> You will not be called according to the paper to move on the reservation for two or three years; then is secured to you your right to fish, to get roots and berries, and to kill game; then your payments are secured to you as agreed; then your schools, your shops, and physicians and other things we have promised are secured; then the salaries, the houses, and the 10-acre farms of your chiefs are secured to him.
>
> * * * * *
>
> I will ask of Looking Glass whether he has been told of our Council. Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the

> reservation on lands not claimed by settlers, *that he can catch fish at any of the fishing stations* * * *. [Italics supplied.]

All of these statements were made in good faith by Governor Stevens at a time when the northwest was very much of a wilderness. They were made at a time when Indians and white men alike hunted and fished as they desired without let or hinderance from the federal or territorial governments. Regulations of fish and game were neither known nor dreamed of. The Indians had from time immemorial fished for salmon on the banks of the Columbia river. The catching of salmon was necessary for the sustenance of themselves and their families. Neither Governor Stevens nor the Indian Chiefs could possibly have visualized present-day conditions and present-day restrictions. They entered into the treaty agreement under situations which existed at that time. We should interpret and construe the treaty and the rights of appellant in the light of the surroundings present at that time.

Without any doubt whatever, Governor Stevens and the Indians signed the treaty with the definite understanding that the Indians should be forever allowed to catch salmon from the Columbia river without any restrictions whatsoever. We should so construe the treaty.

It may be conceded that there is an ambiguity contained in the treaty. However, that ambiguity, if there is one, should be resolved in favor of the Indians. *Winters* v. *United States*, 207 U. S. 564.

The state is not in a position, nor does it have the power, to modify or abrogate a treaty made by authority of the Congress of the United States.

Article I, Sec. 8, of the Federal Constitution, gives to the Congress power

> To regulate commerce with foreign nations and among the several states and with the Indian tribes.

The Enabling Act, 1 Rem. Rev. Stat. 333, Sec. 4, Second, recognized the position of the state in disclaiming all title to all lands

> * * * owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.

There is a definite procedure insisted upon by the courts when the United States seeks to assert its position of dominance by abrogating or changing an Indian treaty, and that is by the passage of a clear and express Act of Congress which is of such a nature that the treaty and the act cannot in any reasonable view stand together. *Cope* v. *Cope*, 137 U. S. 682; *Fong Yue Ting* v. *United States*, 149 U. S. 698.

I realize that the majority opinion is founded upon the following decisions of this court: *State* v. *Towessnute*, 89 Wash. 478, 154 Pac. 805; *State* v. *Alexis*, 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041; *State* v. *Meninook*, 115 Wash. 528, 197 Pac. 641; and *State* v. *Wallahee*, 143 Wash. 117, 255 Pac. 94.

The last three cases cited are based upon the holding in the Towessnute case, *supra*. To my mind, that case is entirely wrong in principle, and

is founded upon an unjust assumption. It states that the Indians are mere occupants of the soil of America. Not so, they owned it as much or more than we do. Our ancestors took the lands from the Indians by conquest because they had firearms and were better able to destroy than the Indians.

Again, the opinion states, in speaking of the words "in common with citizens":

> These words were not used to give something to the white man, but to give something to the red man; not to give the Indian an advantage, but to save him from disadvantage.

Where did the white man get the land to give? The answer is that all of his rights were derived from the Indians. *United States* v. *Winans;* 198 U. S. 371.

The Indians surrendered their land to the white man in consideration of glowing promises of care and protection. When he gave his land away the red man reserved certain rights, among which was the right to fish at accustomed places, a right he had exercised for many, many generations.

It must be said, however, that at the time our former cases were decided, the court did not have the benefit of a report of the proceedings which led to the signing of the treaty under consideration.

The proper disposition of the question and interpretation of the treaty in question was made by the United States Supreme Court in *United States* v. *Winans, supra.*

That court held that the Yakima Indians had a right in the real property and an easement for certain express purposes in and to their usual and

accustomed fishing places on the Columbia River. The court stated:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. *In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.* And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the Territory." As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The con-

tingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. *And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.* [Italics supplied.]

Cf., *United States* v. *Powers,* 16 F. Supp. 155; *United States* v. *Stotts,* 49 F. (2d) 619; *United States* v. *McGowan,* 62 F. (2d) 955.

The cases of *State* v. *Towessnute, State* v. *Alexis, State* v. *Meninock,* and *State* v. *Wallahee, supra,* should be reexamined and overruled.

If Governor Stevens was not sincere and the government secured from the Indians the large domain ceded to it by the making of promises it did not intend to keep, and did not keep, then fraud was practiced on the Indians, and the wrong done to them should be rectified.

On the other hand, if the promises made by Governor Stevens were made in good faith, as I am sure they were, then all of the facts relative to the making of the treaty should be considered in arriving at the intent of the parties.

The treaty should be upheld as construed in the Winans case, *supra,* and the judgment of the trial court reversed.

SIMPSON, *J.*

We concur:

MILLARD, *J.*

BLAKE, *C. J.*

EXHIBIT B

PETITION FOR WRIT OF HABEAS CORPUS IN COMPANION CASE

In the District Court of the United States for the Eastern District of Washington, Southern Division

No. 12

In the Matter of the Petition of The United States of America, In Behalf of Its Ward, SAMPSON TULEE, for a Writ of Habeas Corpus

PETITION

To the Hon. J. STANLEY WEBSTER, United States District Judge in and for the Eastern District of Washington:

Comes now the United States of America, in behalf of its ward, Sampson Tulee, by and through Sam M. Driver, United States Attorney for the Eastern District of Washington, duly authorized by the Attorney General of the United States, and Kenneth R. L. Simmons, District Counsel, Department of the Interior, attorneys for your petitioner, and as grounds for this petition states:

I

That your petitioner is the guardian of Sampson Tulee, a ward of the United States of America, trust Yakima Indian, and a duly enrolled member of the Yakima tribe of Indians.

II

That by virtue of the provisions of paragraph 2 of article 3 of the Yakima Treaty of June 9,

1855 (12 Stat. 951) entered into between the United States of America and the Yakima tribe of Indians, Sampson Tulee, a ward of your petitioner, obtained a right to fish in the Columbia River without interference and without restriction by the State of Washington, or otherwise. That a certified copy of the minutes of the council at which said treaty was executed is hereto annexed, marked Exhibit D, and by this reference made a part of this petition.

III

That the salmon fishing season opened on the Columbia River approximately May 1, 1939. That several hundred members of the Yakima tribe of Indians are now fishing in said river, deriving their living from salmon fish taken from said river within the State of Washington. That the majority of said Indian fishermen, including Sampson Tulee, the ward of your petitioner, have refused to pay license fees to agents of the State of Washington, contending the State of Washington has no right to charge said Indians license fees or restrict their fishing operations on the Columbia River in any manner; and that a serious emergency now exists.

IV

That no relief is available to members of the Yakima tribe of Indians or to Sampson Tulee, the ward of your petitioner, in the courts of the State of Washington.

V

That on May 16, 1939, on information, a copy of which is hereto attached, marked Exhibit A, and hereby made a part of this petition, was filed in the Superior Court of the State of Washington in and for Klickitat County by the State of Washington against Sampson Tulee, ward of your petitioner, charging Sampson Tulee with a misdemeanor, namely catching and selling salmon fish commercially without having first obtained a license for the taking thereof, as required by the laws of the State of Washington.

VI

That a warrant of arrest on said information was issued out of the Superior Court of Klickitat County, Washington, directed against Sampson Tulee, your petitioner's ward; that he was thereupon arrested and is now actually, unjustly and unlawfully imprisoned and restrained of his liberty, and detained under color of the authority of the State of Washington, in the custody of one C. R. House, Sheriff of Klickitat County, in the Southern Division of the Eastern District of Washington; that a copy of said warrant of arrest is hereto attached, marked Exhibit B, and by this reference made a part of this petition.

That an affidavit of the ward of your petitioner, setting out the above facts, is likewise hereto attached, marked Exhibit C, and by reference made a part of this petition.

VII

That Sampson Tulee, your petitioner's ward, admits that on or about the 6th day of May, 1939,

and within the last three years immediately preceding the filing of the information on May 16, 1939, attached hereto, at Spearfish, in Klickitat County, Washington, he caught with a dip bag net certain food fish, to wit, salmon, and that he did then and there sell the same commercially without having first obtained a license for the taking thereof as required by the laws of the State of Washington.

VIII

That the statute of the State of Washington under which said information was filed in Section 5703, Remington's Revised Statutes of the State of Washington.

IX

That the location in the Columbia River where your petitioner's ward caught and took the salmon fish described in the information was and is one of the usual and accustomed fishing places of the Yakima tribe of Indians, described in paragraph 2 of Article 3 of the Yakima Treaty of June 9, 1855 (12 Stat. 951). That the provisions of paragraph 2 of article 3 of said treaty which your petitioner alleges have been violated by the State of Washington are as follows:

> The exclusive right of taking in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; * * *

X

That said statute, namely, Section 5703, Remington's Revised Statutes of the State of Washington, upon which said information is based, is unconstitutional and void insofar as it attempts to regulate, control and restrict fishing in the Columbia River by members of the Yakima tribe of Indians, including Sampson Tulee, the ward of your petitioner.

XI

That Sampson Tulee, your petitioner's ward, is unjustly and unlawfully held in custody and restrained of his liberty by the Sheriff of Klickitat County, Washington, in violation of the Constitution of the United States of America, and in violation of the Yakima Treaty of June 9, 1855 (12 Stat. 951).

XII

That under the Constitution and laws of the United States and the said Yakima Treaty of 1855, Sampson Tulee, ward of your petitioner, has the right to catch certain food fish, including salmon, and to sell the same commercially without first obtaining a dip bag net license or other license as required by the laws of the State of Washington.

Wherefore, your petitioner prays this Court to order the issuance of a writ of habeas corpus in this case addressed to C. R. House, Sheriff of Klickitat County, Washington, ordering and directing said Sheriff to have the body of Sampson Tulee, the ward of your petitioner, before your Honorable Court at a date to be fixed by said Court, at which time your petitioner prays the Court that

Sampson Tulee should be granted a discharge from said custody.

Your petitioner further prays that this Court issue an order staying all hearings and proceedings in the Superior Court of the State of Washington for Klickitat County with reference to the above mentioned case of State of Washington against Sampson Tulee, pending the hearing and determination of this petition.

SAM M. DRIVER,
LYLE KEITH,
KENNETH R. L. SIMMONS,
Attorneys for Petitioner,
United States of America.

---

326 FEDERAL BUILDING,
Spokane, Washington.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss.:

Sam M. Driver, being first duly sworn, on oath deposes and says: That he is the duly appointed, qualified, and acting United States Attorney for the Eastern District of Washington, and makes this verification as such; that he has read the within and foregoing petition, knows the contents thereof, and believes the same to be true.

SAM M. DRIVER.

Subscribed and sworn to before me this 25th day of May 1939.

[CLERK'S SEAL] EVA M. HARDIN,
Deputy Clerk, United States District Court
for the Eastern District of Washington.

EXHIBIT C

DEMURRER TO PETITION FOR WRIT IN COMPANION CASE

In the District Court of the United States for the Eastern District of Washington, Southern Division

DEMURRER

To the Hon. J. STANLEY WEBSTER, United States District Judge in and for the Eastern District of Washington:

Comes now the State of Washington, in behalf of C. R. House, Sheriff of Klickitat County, State of Washington, by and through G. W. Hamilton, Attorney General of the State of Washington, T. H. Little, Assistant Attorney of the State of Washington, and Edgar H. Canfield, Prosecuting Attorney of Klickitat County, Washington, and demurs to the petition for a writ of habeas corpus in the above-entitled cause, and for grounds of demurrer alleges:

I

That the petition does not state any grounds sufficient to authorize the issuance of a writ of habeas corpus.

C. W. HAMILTON,
Attorney General, State of Washington,
T. H. LITTLE,
Assistant Attorney General,
State of Washington,
EDGAR H. CANFIELD,
Prosecuting Attorney of
Klickitat County, Washington,
Attorneys for Respondent.

Dated: June 6, 1939.
Filed June 8, 1939.

EXHIBIT D

ORDER IN COMPANION CASE DENYING WRIT OF HABEAS CORPUS

In the District Court of the United States for the Eastern District of Washington, Southern Division

No. 12

In the District Court of the United States for the of America, in Behalf of its Ward, Sampson Tulee, for a Writ of Habeas Corpus

ORDER

This matter coming on regularly for hearing on the 12th day of June, 1939, on the petition of the United States of America in behalf of its Indian ward, Sampson Tulee, for a writ of habeas corpus, directed to C. R. House, Sheriff of Klickitat County, Washington, and the demurrer of said sheriff to such petition, petitioner appearing by its attorneys Sam. M. Driver, United States Attorney for the Eastern District of Washington, and Kenneth R. L. Simmons, District Counsel, Irrigation Service of the Office of Indian Affairs, Department of the Interior, and the said sheriff appearing in person with the said Sampson Tulee in his custody and by his attorneys T. H. Little, Assistant Attorney General for the State of Washington, and Edgar H. Canfield, Prosecuting Attorney of Klickitat County, Washington, and the Court having duly considered said petition and demurrer and having heard the argument of coun-

sel, and being fully advised in the premises, now finds:

1. That the said petition of the United States of America and the demurrer thereto directly raise the question of whether or not the detention of Sampson Tulee, a Yakima Indian, by said sheriff under a statute of the State of Washington (Rem. Rev. Stat. Section 5703) violates his rights under the Yakima Indian treaty of June 9, 1855 (12 Stat. 951) and the Constitution of the United States and indirectly involves the treaty rights of all the other members of the Yakima Indian Tribe; and that because of the existence of exceptional circumstances of an emergency character, as stated in said petition, the case is a proper one for application to a United States District Court for a writ of habeas corpus and for assumption and exercise of jurisdiction on the merits by such court under the provisions of Title 28, U. S. C. A., Section 453 (Rev. Stat. Section 753).

2. That the right secured to the Indians under the said Yakima treaty of June 9, 1855, of taking fish at their usual and accustomed places in common with the citizens of the territory is subject to the paramount and superior right of the state, under the exercise of its sovereign police powers, to reasonably regulate the taking of salmon and other fish from waters within its jurisdiction, and that the said statute of the State of Washington, Rem. Rev. Stat. Section 5703, is a proper and reasonable exercise by said state of such police powers.

3. That the detention of Sampson Tulee by C. R. House, sheriff of Klickitat County, Washington, as alleged in the petition herein, does not violate

any of his rights under the said Yakima treaty or the Constitution and laws of the United States.

It is now, therefore, Ordered that the demurrer of C. R. House, Sheriff of Klickitat County, Washington, to the petition of the United States of America for writ of habeas corpus in the above-entitled cause be, and the same is hereby, sustained and the said petition for writ of habeas corpus be, and the same is hereby, denied.

Dated this 22nd day of June, 1939.

J. STANLEY WEBSTER,
United States Judge for the Eastern District of Washington.

Presented by:

SAM M. DRIVER,
United States Attorney.

Approved as to form:

T. H. LITTLE,
Assistant Attorney General, One of the Attorneys for C. R. House, Sheriff.

(Endorsed): Filed June 22, 1939.

EXHIBIT E

OPINION FILED IN COMPANION CASE ON APPEAL FROM ORDER DENYING WRIT OF HABEAS CORPUS

United States, In Behalf of Tulee, v. *House, Sheriff,* No. 9340, Circuit Court of Appeals, Ninth Circuit, April 3, 1940

Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division; J. Stanley Webster, Judge.

Habeas corpus proceeding by the United States of America, in behalf of its ward, Sampson Tulee, against C. R. House, Sheriff of Klickitat County, Washington, to obtain the release of the ward from the custody of the sheriff. From a judgment denying the petition, the United States appeals.

Affirmed.

Sam M. Driver, U. S. Atty., and Lyle Keith, Asst. U. S. Atty., both of Spokane, Wash., and Kenneth R. L. Simmons, Dist. Counsel, Department of Interior, of Billings, Mont., for appellant.

G. W. Hamilton, Atty. Gen., State of Washington, T. H. Little, Asst. Atty. Gen., State of Washington, and Edgar H. Canfield, Pros. Atty., of Goldendale, Wash., for appellee.

Before Haney, Stephens, and Healy, Circuit Judges.

Haney, Circuit Judge.

Sampson Tulee, a Yakima Indian, was arrested, upon an information being filed in a state court in Klickitat County, Washington, and the petition before us seeks his release from the custody of the sheriff of that county.

On May 16, 1939, Tulee was charged in an information with having caught a salmon, a food fish, on May 6, 1939, with a dip bag net, and selling the same commercially, without having first obtained a license to do so, as required by 7 Rem. Rev. Stat. of Wash., sec. 5693. A warrant of arrest was issued, and Tulee was taken into custody by appellee.

The petition herein, after alleging such facts, alleged that Tulee was illegally restrained of his liberty because the Washington statute under which he was detained was unconstitutional and

void. The statute was alleged to be void because it violated paragraph 2 of Article 3 of the Yakima Treaty of June 9, 1855 (12 Stat. 951) which provides in part:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; * * *.

The petition admits that Tulee did in fact commit the acts described in the information. While the petition does not allege that the place where the fish were caught was on the Yakima Indian Reservation, it does allege that such place "was and is one of the usual and accustomed fishing places of the Yakima tribe of Indians."

The petition also alleges:

> That the salmon fishing season opened on the Columbia River approximately May 1, 1939. That several hundred members of the Yakima tribe of Indians are now fishing in said river, deriving their living from salmon fish taken from said river within the State of Washington. That the majority of said Indian fishermen, including Sampson Tulee, the ward of your petitioner, have refused to pay license fees to agents of the State of Washington, contending the State of Washington has no right to charge said Indians license fees or restrict their fishing operations on the Columbia River in any manner; and that a serious emergency now exists. It was further alleged that "no

relief is available to members of the Yakima tribe of Indians or to Sampson Tulee, the ward of your petitioner in the courts of the State of Washington."

The court below issued an order directing appellee to appear and show cause why the writ should not issue. Appellee filed a demurrer, on the ground that "The petition does not state any grounds sufficient to authorize the issuance of a writ of habeas corpus." The trial court found that the pleadings "directly raise the question of whether or not the detention of Sampson Tulee, a Yakima Indian, by said sheriff under a statute of the State of Washington (Rem. Rev. Stat. Section 5703) violates his rights under the Yakima Indian treaty of June 9, 1855 (12 Stat. 951), and the constitution of the United States and indirectly involves the treaty rights of all the other members of the Yakima Indian Tribe; and that because of the existence of exceptional circumstances of an emergency character, as stated in said petition, the case is a proper one * * * for assumption and exercise of jurisdiction on the merits by" the court below.

The court below held that the right secured to the Indians by the treaty "is subject to the paramount and superior right of the state, under the exercise of its sovereign police powers, to reasonably regulate the taking of salmon and other fish from waters within its jurisdiction" and that the state statute in question "is a proper and reasonable exercise by said state of such police powers." This appeal is taken from the order denying the petition.

Notwithstanding the desire of both parties for a decision on the merits, we believe the rule to be applied is the one stated in *Mooney* v. *Holohan*, 294 U. S. 103, 115, 55 S. Ct. 340, 343, 79 L. Ed. 791, 98 A. L. R. 406, that—

> Orderly procedure, governed by principles we have repeatedly announced, requires that before this Court is asked to issue a writ of habeas corpus, in the case of a person held under a state commitment, recourse should be had to whatever judicial remedy afforded by the state may still remain open.

This court has repeatedly invoked that rule with respect to petitioners held under the commitment of state courts. *Hall* v. *People of State of California*, 9 Cir., 79 F. 2d 132; *Phillips* v. *McCauley*, 9 Cir., 92 F. 2d 790, 791; *Milliken* v. *McCauley*, 9 Cir., 93 F. 2d 645; *Palmer* v. *McCauley*, 9 Cir., 103 F. 2d 300; *Frach* v. *Mass.*, 9 Cir., 106 F. 2d 820, 821. We think appellant should be accorded the same nondiscriminatory treatment heretofore accorded other petitioners, and is not entitled to special privilege or dispensation, because:

First. Although it is alleged in the petition that "no relief is available to members of the Yakima tribe of Indians or to Sampson Tulee, the ward of your petitioner, in the courts of the State of Washington", surely such an allegation is not binding on us when we know it to be false. The petition merely shows that an information was filed and that Tulee was arrested. It does not appear that Tulee has been tried; or if tried that he has been convicted; or if convicted, that he has appealed to the Supreme Court of Washington; or if he has appealed, that the judgment was affirmed; or, if

the judgment was affirmed, that he has sought review in the Supreme Court of the United States. From the allegations of the petition, and it is conceded by the parties, it is apparent that the remedy outlined is still available to appellant. Furthermore, the Washington statutes relating to habeas corpus (3 Rem. Rev. St. of Wash. secs. 1063–1085) may afford appellant another remedy.

It is apparent that appellant's remedy is in the state courts. What he actually means by his allegation, quoted above, is that he believes that he cannot get a favorable decision in the state courts, because of previous construction of the treaty by the Supreme Court of Washington. Whether such court properly construed the treaty is of no moment here, because a writ of habeas corpus may not be used as an anticipatory appeal. *Rumely* v. *McCarthy*, 250 U. S. 283, 288, 289, 39 S. Ct. 483, 63 L. Ed. 983; *Henry* v. *Henket*, 235 U. S. 219, 228, 229, 35 S. Ct. 54, 59 L. Ed. 203.

Second. Appellant concedes that he is not entitled to special dispensation merely because the United States appears in the proceeding. See *United States ex rel.* v. *Tyler*, 269 U. S. 13, 46 S. Ct. 1, 70 L. Ed. 138.

Third. Appellant contends that the instant case falls within the exception to the general rule stated and applied in *Mooney* v. *Holohan, supra.* The exception is stated in *Urquhart* v. *Brown*, 205 U. S. 179, 182, 27 S. Ct. 459, 460, 51 L. Ed. 760, as follows:

> * * * The exceptional cases in which a Federal court or judge may sometimes appropriately interfere by habeas corpus in advance of final action by the authorities of

> the state are those of great urgency, that require to be promptly disposed of; such, for instance, as cases "involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations." * * *

In *Urquhart* v. *Brown, supra,* in which this exception was stated, and in which the Supreme Court applied the general rule, the appeal was taken from the Circuit Court of the United States for the Western District of Washington.

Since a demurrer was filed to the petition, only the facts stated in the petition, and those of which we may take judicial notice are before us. The only allegations bearing on the question are:

> * * * That several hundred members of the Yakima tribe of Indians are now fishing in said river, deriving their living from salmon fish taken from said river within the State of Washington. That the majority of said Indian fishermen, including Sampson Tulee, the ward of your petitioner, have refused to pay license fees to agents of the State of Washington, contending the State of Washington has no right to charge said Indians license fees or restrict their fishing operations on the Columbia River in any manner; and that a serious emergency now exists.

It is obvious that neither the "authority" or "operations" of the United States is involved. Appellee does not challenge any authority of the United States, or any action thereof, in any manner. The thing challenged is the authority of the state, not of the United States. As said in *United States, ex rel.,* v. *Tyler, supra,* 269

U. S. 17, 46 S. Ct. 2, 70 L. Ed. 138, that insofar as the questions raised "involve treaty or constitutional rights" the state courts "are as competent as the federal courts to decide them" and:

> * * * In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions should first be exhausted. When that has been done, the authority of this court may be invoked to protect a party against any adverse decision involving a denial of a federal right properly asserted by him.

It is likewise clear that no operation of the United States is involved. What is in question is the action of an Indian and a state. No officer of the United States is restricted from carrying out his duties, as was the case in *Ohio* v. *Thomas,* 173 U. S. 276, 19 S. Ct. 453, 43 L. Ed. 699, and *Boske* v. *Comingore,* 177 U. S. 459, 20 S. Ct. 701, 44 L. Ed. 846.

The obligations or relations of the United States with a "foreign nation" are not here involved because Indian tribes "are not foreign nations." *Jones* v. *Meehan,* 175 U. S. 1, 10, 20 S. Ct. 1, 5, 44 L. Ed. 49.

> The North American Indians do not, and never have, constituted "nations" as that word is used by writers upon international law, although in a great number of treaties they are designated as "nations" as well as tribes.

Montoya v. *United States,* 180 U. S 261, 265, 21 S. Ct. 358, 45 L. Ed. 521.

Appellant relies on *In re Race Horse,* C. C. Wyo., 70 F. 598, 604, and *Ward* v. *Race Horse,* 163 U. S. 504, 505, 16 S. Ct. 1076, 41 L. Ed. 244. The question there presented was whether the court had jurisdiction at all. Here, unquestionably, the court below had jurisdiction. 28 U. S. C. A. sec. 453. The question is not whether jurisdiction existed, but the propriety of its exercise.

The bare allegation in the petition "that a serious emergency now exists" does not aid appellant. No facts are alleged showing what such "serious emergency" is. Imprisonment of any human being is a "serious emergency" to the prisoner, but that clearly is insufficient. Such allegation is a conclusion of law, and if we accept it here, logic compels us to accept it in the numerous cases presented to us by petitioners held under commitments of the states in this circuit. In *Hall* v. *People of State of California,* 9 Cir., supra, petitioner alleged that he was imprisoned in violation of the Constitution and laws of the United States

> and unless a writ of habeas corpus issue forthwith the judgment of conviction and sentence to the penalty of death will be carried out * * * to the irremediable damage and loss of life of this petitioner.

It is difficult to conceive of a more serious emergency than was presented in that case, yet it was insufficient to bring the exception into operation. We believe the bare allegation of a "serious emergency" is wholly insufficient here, for by merely inserting a like bare allegation in his petition, every petitioner detained by virtue of a state proc-

ess could invoke and be entitled to consideration of his petition in a federal court, thus making inapplicable the general rule.

Independently of the foregoing, we think the allegation of a "serious emergency" is a conclusion of law. The application for the writ is required to be made by complaint in writing "setting forth the *facts* concerning the detention of the party restrained." [Italics supplied.] 28 U. S. C. A. sec. 454. No facts are alleged showing what the "serious emergency" is. The statute requires such facts for "more averments of conclusions of law are necessarily inadequate." *Craemer* v. *Washington State*, 168 U. S. 124, 129, 18 S. Ct. 1, 3, 42 L. Ed. 407.

In this connection the court below found that there were, here, exceptional circumstances of an emergency character "as stated in said petition." As thus qualified the finding is of no weight here, since, as we have held, the petition states no exceptional circumstances of an emergency character.

Finally, appellant frankly admits that an agreement was reached between the United States and the State of Washington whereby the latter would "hold in abeyance some 70 other cases against other Indian residents * * * providing the United States would immediately test out the right of the State to license Indian fishermen, in the federal Courts." It would seem, therefore, that the emergency, if any, which previously existed, ended before the instant petition was filed.

The order denying the writ is affirmed.

[110 F. (2d) 797–801.]

EXHIBIT F

OPINION IN RELATED CASE NOT YET REPORTED

Makah Indian Tribe, et al. v. *B. F. McCauly, et al.*, No. 218

United States District Court, Western District of Washington, Northern Division

Memorandum Decision, filed May 1, 1941

Vanderveer, Bassett & Geisness, Seattle, Washington, Attorneys for Plaintiffs.

Hon. Smith Troy, Attorney General of the State of Washington, Olympia, Washington; Hon. T. H. Little, Asst. Attorney General of the State of Wash., Olympia, Washington; attorneys for Defendants.

BOWEN, *District Judge:*

Motion for judgment on the pleadings which consist of the complaint and answer.

The complaint alleges among other things that plaintiff Indians by the Makah Indian Treaty of 1859 were secured in their right to fish at their usual and accustomed grounds and stations including the Hoko River in the Olympia Peninsula of the State of Washington, but that the defendant state officers since 1933 have interfered with and prevented such rights by threatening to arrest plaintiff Indians and to confiscate their fishing gear, and that the defendants will, unless enjoined by this court, continue to so prevent plaintiffs from

enjoying such fishing rights in the future, all in violation of such treaty.

By their answer defendants allege (1) that this court is without jurisdiction of the subject matter; (2) that the defendants are state officers, that their acts complained of are in pursuance of a state statute, that they are not the real parties in interest but that the real party in interest is the state of Washington (which it is argued by reason of the 11th Amendment cannot be sued in this action); (3) that plaintiff Indians are wards of the United States Government and have no capacity to sue except as such wards by the United States Attorney; and (4) that plaintiffs' complaint fails to state a cause of action upon which relief can be granted (under which issue defendants argue and plaintiffs deny that the Makah Indian Treaty is invalid as against the asserted authority of defendant state officers to enforce the state fishing laws, which are nowhere specially set up in the pleadings).

1. This court has jurisdiction of the subject matter of this action because it involves plaintiffs' asserted rights under an Indian treaty with the United States of the alleged value of more than $3,000.00 exclusive of interest and costs, plaintiffs' allegations of such jurisdictional amount being admitted by defendants' answer.

2. This is an action against state officers for relief against their acts alleged to be unlawful because in conflict with plaintiffs' fishing rights under the Makah Indian Treaty with the United States. "The action is not one in its essential nature and effect against the state to enforce a state liability, and so is not repugnant to the Eleventh

Amendment" to the U. S. Constitution. *Sampson* v. *Brennan,* Cause No. 74 of this Court, Memorandum Decision filed August 3, 1939. See also *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 10; Ex parte Young, 209 U. S. 123; Ex parte New York, 256 U. S. 490, 500.

3. "Plaintiff Indians being citizens of the United States (8 U. S. C. A., Sec. 3) may as other citizens employ counsel of their own choice. They may also in a federal court institute and prosecute an action to enforce their rights under the Constitution, laws or treaties of the United States." *Sampson* v. *Brennan, supra.* See also *Deore* v. *New York,* 22 F. (2d) 851; *Y-Ta-Tah-Wah* v. *Rebock,* 105 Fed. 257, 259; *Lane* v. *Santa Rosa,* 249 U. S. 110, 113-114.

4. The final issue presented is whether the complaint states a cause of action upon which the requested relief can be granted. In the briefs and at the oral argument counsel have treated and the court will likewise treat this issue as raising the question of the validity of Article IV of the Makah Treaty providing that:

> The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, * * * together with the privileges of hunting and gathering roots and berries on open and unclaimed lands: *Provided, however,* That they shall not take shellfish from any beds staked or cultivated by citizens.

Defendants emphasize that although the right to fish (the only right here in question) is by the treaty *"further secured"* to the Indians, such right

is so secured only *"in common with all citizens"* of the United States, and therefrom defendants argue that just as are other citizens' fishing rights, so are such rights of the Indians, subject to all reasonable police power legislation and regulation by the state for the preservation and protection of fish and game, that such police power reserved to the people and exercised for them by the state is paramount to all conflicting treaty provisions, that the state fish and game laws are police measures which apply not only to the Indians but alike to all citizens, Indians and others, and that this conflicting treaty provision securing to the Indians their fishing rights must yield to such state police laws.

But does not that argument assume that the Treaty *granted* instead of "further secured" to the Indians their fishing rights? Obviously such an assumption is contrary to the fact indisputably established by history and common knowledge. This nation by conquest and treaty acquired the land from the Indians, but before and after every conquest and conflict and after many a treaty the Indians asserted and enjoyed their ancient right to hunt and fish. That ancient right, of all the Indian rights of remotest antiquity, has by this nation and the Indians been regarded as the most sacred right of the Indians and has seldom ever been questioned. It is believed that, before the Stevens treaties of which the Makah Treaty is one, the Indians' right to fish in the domain now included in this state never was questioned by public authority or at all, and in this instance it is a most notable fact that subsequent to this Treaty the right to fish "further secured" to the Indians

by this Treaty was unfailingly recognized and respected by all until the year 1933, a continuous period of about 75 years.

This Court is of the opinion that as contended by plaintiffs the answer to this question as to the Treaty's validity turns upon the sounder theory that the Treaty *granted* nothing to the Indians, but that the Treaty in truth and in fact merely reserved and preserved inviolate to the Indians the fishing rights which from time immemorial they had always had and enjoyed. This conclusion is rendered inescapable by a fair consideration not only of Article IV, supra, but also of all the other provisions of the Treaty. Nowhere in the Treaty can be found a *conveyance* by the United States to the Indians of any property, except the money consideration to be paid by the Government for the lands and rights in the Treaty conveyed by the Indians to the Government. In the Treaty the United States is the sole grantee and the Indians exclusively are the grantors of all the property covered by the Treaty, except that money consideration, and with that single exception the Treaty *conveyed* no property to the Indians. Upon consideration of the conveyance by the Indians of their lands to the Government, the United States by Article IV, supra, solemnly recognized and guaranteed that "The right of taking fish * * * *at usual and accustomed grounds and stations is further secured to said Indians* * * *." [Italics supplied.] So it is readily seen the Treaty does not even purport to *grant* any fishing rights. It merely "*further secured*" to the Indians what fishing rights they already had, at their "usual and accustomed grounds and stations."

That conclusion is further fortified by the following statements of the Indian chiefs and headmen and of Governor Stevens when they negotiated this Treaty in 1855:

> Kalchote of Neah Bay said that he thought he ought to have the right to fish and take whale and get food where he liked. Keh-Tchook of the Stone House (Tatoosh Island) spoke next, saying that what Kalchote had said was his wish, that his country extended up to Hoke-Ho (Hoko River) and that he did not wish to leave the salt water. Governor Stevens then informed them that instead of wishing to stop their fisheries he wished to send them oil kettles and fishing apparatus. Klah-Prathoo of Neah Bay then replied that he was willing to sell his land; all he wanted was the right of fishing. (Affidavit of Charles E. Peterson et al. filed October 1, 1940.)

And so by stating the foregoing objects and purposes of the Treaty, the spokesmen for its High Contracting Parties construed it as a solemn declaration and guarantee reserving to the Indians for the Treaty's duration, which those spokesmen undoubtedly then thought would be for all time to come, the sacred fishing rights of the Indians already and from time immemorial enjoyed by them. How then can it be said that the Treaty *granted* any Indian fishing rights? It did not. It merely *reserved* and guaranteed to the Indians these fishing rights which they always before had possessed and enjoyed.

That construction also leads to a denial of defendants' further contention that by the phrase "in common with all citizens of the United States"

the treaty provision for the Indians' benefit was intended to be subject to future state police regulation of fish and game, because other citizens' fishing rights are subject to such police regulation. But it is far more probable that by that phrase the Indians merely indicated their willingness to share their preexisting fishing rights with all citizens, and that the Indians were willing to continue to recognize other citizens' fishing rights then known to the Indians. There is no allegation or showing in this case that the Indians anticipated the possibility that in the future other citizens might have their fishing rights limited by the exercise of state police power or that other citizens' fishing rights as the Indians knew them when the Treaty was made might in any way be changed. Nor is there allegation or proof here that the Indians knew of or appreciated the present or possible future existence of any state sovereignty which might attempt to limit the fishing rights of either Indians or other citizens. The only sovereignty, other than their own tribal authority, whose power to regulate fishing was understood by the Makah Indians, very likely was our national government, to them the "Great White Father," with whom they were then negotiating a treaty to reserve and further secure to them their fishing rights at their "usual and accustomed" places.

This nation never acquired for its people by conquest, and did not by the Makah Treaty acquire, the pre-existing ancient Indian fishing rights on which the asserted police power could operate. The police power here invoked by defendants does not apply to subjects, such as Indian fishing rights, not possessed by the people, state, or nation. The

cases of *Kennedy* v. *Becker*, 241 U. S. 556, and *Ward* v. *Race Horse*, 163 U. S. 504, limiting or denying Indian treaty fishing rights, relied upon by defendants, are distinguishable upon the ground either that the treaty provisions limited the Indians' reserved rights or that the Indians anticipated the future sovereign power to limit.

Those cases are distinguishable upon the further ground that the grant of citizenship to Indians by the Act of June 2, 1924 (8 U. S. C. A., Sec. 3), enacted subsequent to decision of those cases, definitely withdrew the Indians' tribal and other property, such as fishing rights, from the operation of police power affecting the rights of other citizens. In effect, it was so held in *Mason* v. *Sams*, 5 F. (2d) 265 (D. C. Wash.), where Judge Cushman for the court at pages 257 and 258 said:

> These Indian plaintiffs have been, by the Act of June 2, 1924 (43 Stat. at Large 1923–1924, part 1, page 253, c. 233), made citizens of the United States, with this proviso:
>
> "That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."
>
> Under the rule favoring the Indians in the interpretation of treaties and laws affecting them, already alluded to, any fishing rights of plaintiffs under the treaty are preserved by this proviso.

This Makah Treaty should have applied to it in favor of the Indians the rule of *Nielson* v. *Johnson*, 279 U. S. 47, 51–52, applicable to Indian and other treaties, that:

> Treaties are to be liberally construed so as to effect the apparent intention of the

> parties. (Citing cases.) When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred (citing cases), and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation, and when so ascertained must prevail over inconsistent state enactments. (Citing cases.) When their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it. (Citing cases.)

And the Supreme Court has held that an Indian treaty should be liberally construed so as to give effect to the meaning attached to the treaty by the Indians themselves. So in *Seufert Brothers Company* v. *United States*, 249 U. S. 194, 198, quoting in part from *U. S.* v. *Winans*, 198 U. S. 371, the court said:

> We will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right without regard to technical rules." 119 U. S. 1; 175 U. S. 1.

No exception is made of the sate police power in the rule above quoted from *Nielsen* v. *Johnson*,

supra, when the court said "* * * as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed (i. e., liberally) is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments."

The decision of this court upon the motion for judgment on the pleadings is that judgment should be entered for plaintiffs in accordance with the prayer of their complaint.

An order may be settled upon notice or stipulation.

JOHN C. BOWEN,
United States District Judge.

Due, legal, and personal service of the within and foregoing appendix to the statement as to jurisdiction and receipt of a true copy thereof is hereby acknowledged this 30th day of June 1941.

SMITH TROY,
Attorney General for the State of Washington.
T. H. LITTLE,
Assistant Attorney General
for the State of Washington.

In the Supreme Court of the United States

OCTOBER TERM, 1941

SAMPSON TULEE, APPELLANT

v.

STATE OF WASHINGTON, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

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No. 318

In the Supreme Court of the United States

OCTOBER TERM, 1941

SAMPSON TULEE, APPELLANT

v.

STATE OF WASHINGTON, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR APPELLANT

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 318

SAMPSON TULEE, APPELLANT

v.

STATE OF WASHINGTON, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR APPELLANT

OPINIONS BELOW

The majority and minority opinions of the Supreme Court of the State of Washington are reported in 7 Wn. (2d) and appear in the record at pages 16–34.

JURISDICTION

The judgment of the Supreme Court of Washington was entered April 2, 1941 (R. 38). The petition for appeal was filed (R. 43) and allowed (R. 47) on June 30, 1941. Jurisdiction to entertain this appeal is based on Section 237 (a) of the Judicial Code, as amended by the Act of

February 13, 1925 (43 Stat. 936), by the Act of January 31, 1928 (45 Stat. 54), and by the Act of April 26, 1928 (45 Stat. 466). The clause in Section 237 (a) particularly relied on is the one which refers to cases

> where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity * * *.

Probable jurisdiction was noted by this Court on October 13, 1941.

QUESTION PRESENTED

Whether the State of Washington may constitutionally prohibit the Yakima Indians from exercising the right, secured to them by a treaty with the United States, to fish at "all usual and accustomed places" outside the Yakima Reservation, unless the Indians have first procured a state license and paid a state license fee.

STATEMENT

Appellant is an Indian ward of the United States and a member of the Yakima Tribe (R. 3), one of a confederated group known as the "Yakima Nation of Indians" which, on June 9, 1855, concluded a treaty with representatives of the United States at Camp Stevens in the Territory of Washington (R. 69–138). This treaty was ratified by the Senate on March 8, 1859, and approved by the President on April 18, 1859 (12 Stat. 951–956).

By Article I of the treaty, the Indians ceded to the United States all the land, described by metes and bounds, which they had been using and occupying from time immemorial. By Article II, however, a designated part of this tract was reserved "for the exclusive use and benefit of" the Indians;[1] and under Article III certain fishing rights were "further secured" to the Indians, partly inside and partly outside the main reservation. The latter provision, which is of special importance in this case, reads (12 Stat. 953):

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Among the "usual and accustomed places" referred to was a rock jutting out from the shorelands of the Columbia River at a place now known as Spearfish, in Klickitat County, Washington (R. 3, 55, 57, 59, 60, 61, 62). On May 6, 1939, appellant caught some salmon at Spearfish without

[1] In net totals, 16,920 square miles of land were conveyed to the United States by the Indians and 1,233 square miles were reserved under Articles I and II (R. 69).

having applied for or obtained the state license or paid the state license fee provided for in the state licensing law[2] (R. 3, 55, 57). Under the interpretation of the licensing law adopted below by the state courts appellant was required to obtain a state license and pay a state license fee before exercising his right under the federal treaty "of taking fish at all usual and accustomed places" in streams of the state which, like the Columbia River, neither run through nor border on the Yakima Reservation.[3] Failure to comply constituted a misdemeanor punishable by fine or im-

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[2] Section 5703, 1940 Pocket Part for 7 Remington's Revised Statutes of Washington. This is a codification of 1937 Wash. Session Laws, ch. 149, pp. 529–534. For pertinent excerpts see Appendix, p. 52.

[3] The same interpretation had already been adopted in several prior cases, in each instance, however, by a divided court. *State* v. *Towessnute*, 89 Wash. 478, 154 Pac. 805; *State* v. *Alexis*, 89 Wash. 492, 152 Pac. 810; *State* v. *Meninock*, 115 Wash. 528, 197 Pac. 641. See *State* v. *Wallahee*, 143 Wash. 117, 255 Pac. 94. On the other hand in *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557, the court had held the state licensing statute inapplicable to fishing by Yakima Indians in streams flowing through the Yakima Reservation. These interpretations are not inconsistent. They are based on the assumption that the state licensing law, being couched in general terms, should be interpreted as broadly as the state's jurisdiction or constitutional power permitted. The different results reached thus merely reflect the views of the Supreme Court of Washington that the state has no jurisdiction or power over fishing activities of Yakima Indians pursuant to the treaty in streams which flow through or border on the Yakima Reservation, but does have such power in streams which neither border on nor flow through the reservation. Adopt-

prisonment or both; and this is the crime for which appellant has been prosecuted in this case.[4]

ing this distinction in the case at bar, the state Supreme Court stated:

"We are not here concerned with the right of the Indians to take fish from the streams running through or bordering upon the reservation. * * *

"This court, in the case of *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557, held that the state had no jurisdiction over the Indians, insofar as their right to fish in streams flowing through or bordering upon a reservation was secured to them by a treaty similar to that above referred to. (7 Wn. (2d) 124, 127, 129; R. 17–18.)"

[4] Strictly speaking, there is no such thing under the laws of the State of Washington as the "crime of Illegal Taking and Sale of Commercial Food Fish" charged against appellant in the amended information (R. 3) on which he has been tried and convicted. Section 5703 itself, so far as relevant in this case, merely provides how licenses are to be obtained and fees paid, and specifies various fees for various types of fishing. It is equally applicable whether the fish are caught in order to be sold commercially or for any other purpose. The same is true as to Section 5693, Rem. Rev. Stat. Wash. (Appendix, p. 53), which prohibits fishing without the required license and makes it a misdemeanor for anyone to do so. The state laws do impose "catch taxes" of various sorts on fish caught for commercial purposes which appellant, in common with a vast number of other Indians in the same position, have refused to pay. (Appellant's Statement as to Jurisdiction, pp. 40–42; see also Appellee's Statement as to Jurisdiction.) But failure to pay these taxes did not on May 6, 1939, and does not now constitute a crime and the question of their validity is not directly involved in this case. Thus, there really was no necessity for the state to allege or prove the commercial character of appellant's fishing activities involved in the case at bar. However, appellant neither objected thereto nor was prejudiced thereby; and this extraneous material may now be disregarded as surplusage.

At the trial in the Superior Court of Klickitat County, Washington, Judge Stone, at the state's request (R. 6), gave the jury the following charge (R. 10–11):

INSTRUCTION NO. 4

> You are instructed that the State of Washington has the right to regulate the taking of fish within its boundaries and in streams not included in or bordering upon the Yakima Indian Reservation. You are further instructed that this right of regulation includes the right of fixing licenses and providing for penalties in the event of noncompliance with whatever regulations are enacted. You are further instructed that the defendant Sampson Tulee is subject to these regulations so long as he is fishing on streams not included in or bordering upon the Yakima Indian Reservation, and that the fact of his being a member of the Yakima tribe of Indians must not be considered so far as these regulations are concerned.

The trial judge also rejected the two instructions requested by appellant, the first being for a directed verdict in his favor and the second expressing views as to the interpretation and effect of the treaty on the state licensing statute precisely the opposite of those in the state's Instruction No. 4.

Appellant noted his objections and exceptions to both rulings and also read the following supporting statement into the record (R. 67–68):

DEFENDANT'S EXCEPTIONS TO INSTRUCTIONS

Mr. SIMMONS. If the Court please, the Jury having withdrawn, the defendant Sampson Tulee, now objects to the Court giving Instruction No. 4 for the following reasons:

1. There is no jurisdiction in this Court nor in the State of Washington over the fishing activities of the Yakima Indians and, in particular, over this defendant, Sampson Tulee, a member of the Yakima tribe of Indians, when fishing at Spearfish, the usual and accustomed fishing place as defined by the Yakima Treaty of June 9, 1855 (12 Stat. 951):

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as, also, the right of taking fish at all usual and accustomed places in common with citizens of the territory, and of erecting temporary buildings for curing them."

2. That said Statute, namely Section 5703, Remington's Revised Statutes of the State of Washington, upon which said amended information is based is unconstitutional and void insofar as it attempts to regulate, control, or restrict fishing at Spearfish, Washington, the location set forth in the amended complaint on file herein by the defendant, Sampson Tulee, a member of the Yakima tribe of Indians.

3. By paragraph 2 of Article III of the Treaty of June 9, 1855 (12 Stat. 951) there is allotted to members of the Yakima tribe of Indians and to this defendant, Sampson Tulee as a member of the Yakima Tribe of Indians the perpetual right to take fish in all the streams bordering upon or running through said Reservation as well as at all usual and accustomed places, including Spearfish, Washington, without interference by the State of Washington, or otherwise.

4. The fishing activities of the Yakima Indians at their usual and accustomed fishing places as defined by the treaty of June 9, 1855, which would include Spearfish, Washington, the location named in the amended information on file herein, are exclusively under Federal jurisdiction and not the jurisdiction of the State of Washington.

Defendant excepts to the failure of the Court to give Defendant's proposed instruction No. 1 for the reason that it affirmatively appears from the evidence of the plaintiff, state of Washington, that Sampson Tulee caught and sold salmon at Spearfish, Washington, which was the usual and accustomed fishing place on the Columbia River of the Yakima tribe of Indians as defined in the Yakima Indian treaty of June 9, 1855; that Sampson Tulee was not subject in fishing at said place to the regulatory laws of the State of Washington, and the verdict, therefore, should have been directed in favor of the defendant.

> The defendant excepts to the failure of the Court to give defendant's proposed Instruction No. 2 for the identical reasons given and set forth in support of the defendant's exception to the giving by the Court of its instruction No. 4.

The jury returned a verdict of "Guilty" (R. 13, 68); the trial judge sentenced appellant to a fine of $25 and costs (R. 13–14, 68); the Supreme Court of the State of Washington (R. 15, 68) affirmed the conviction by a five to three decision (R. 16–34, 38); whereupon appellant filed the present appeal (R. 43–49).

SPECIFICATION OF ERRORS

Appellant intends to urge all the errors which have been assigned (R. 45–46) except the one in paragraph 2.

SUMMARY OF ARGUMENT

I

By a treaty concluded in 1855 the United States secured to the Yakima Indians "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." Notwithstanding this treaty provision the Supreme Court of Washington has interpreted the state statutes as requiring appellant, a Yakima Indian, to procure a license before fishing at one of the "usual and accustomed places." It is appellant's position that the state statute, when so interpreted, is repugnant to the treaty and therefore

unconstitutional. Even if it be assumed that upon its admission to the Union the State of Washington acquired general power to regulate the manner in which Indians exercised their treaty fishing rights (which appellant denies—see point II), clearly the state did not have the power to impose the particular requirement here involved because it prohibits Indians from any exercise of their treaty rights unless they first obtain the state's permission and pay the required license fee and thereby conflicts with the exercise of federal powers represented by the treaty.

It cannot be urged that because fishing by white citizens is subject to state regulation the treaty confers upon the state the power to regulate Indian fishing. Prior to the treaty the Indians possessed full rights to the lands which they occupied. By the treaty they gave up their power to exclude the white citizens of the Territory from their "usual and accustomed" fishing places; but they did not thereby subject themselves to the regulatory power of a state which was not to come into existence until 34 years thereafter.

II

The right of the Yakima Indians to fish at the "usual and accustomed places" outside their reservation is a right under the special protection and guardianship of the federal government extended thereto by virtue of the provisions in the Yakima treaty and in other applicable laws

of the United States. This protective relationship placed the fishing right under the *exclusive* jurisdiction of the United States. (See cases cited at pp. 44–45.) Accordingly, the state statute, which the court below interpreted as regulating the Indian fishing right, is unconstitutional.

ARGUMENT

I

THE STATE LICENSING STATUTE, AS INTERPRETED BELOW BY THE HIGHEST STATE COURT AND TO THE EXTENT THERE APPLIED TO APPELLANT, IS UNCONSTITUTIONAL AND VOID ON THE GROUND OF ITS REPUGNANCE TO THE TREATY BETWEEN THE UNITED STATES AND THE YAKIMA NATION OF INDIANS.

We submit that appellant is entitled to a reversal because the judgment entered against him in the state Supreme Court constitutes a violation of Article VI, clause 2, of the Constitution. This clause provides that:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The state does not contend that the Yakima Indian Treaty was not made under the authority of the United States or that appellant, as a member of

the Yakima tribe, is not entitled to exercise the rights which, under the treaty, the Yakima Nation has reserved and the United States has pledged its faith "to secure" to the Yakima Indians. To the extent that the other elements essential to appellant's affirmative case have not been conceded by the state and recognized by the state Supreme Court, they are established by the decision of this Court in *United States* v. *Winans,* 198 U. S. 371. Accord: *Seufert Bros. Co.* v. *United States,* 249 U. S. 194. The *Winans* case holds that the fishing provision was appropriately incorporated into the treaty with the Yakimas and that the rights reserved under it, outside as well as inside the reservation, constitute not mere privileges or licenses to be enjoyed at the sufferance of the United States, of the state or of the owner of the property on which the "usual and accustomed" fishing places are situated, but perpetual rights *which are entitled to protection under the treaty against impairment by the State of Washington* and its grantees as well as against the United States and its grantees. The case related to an ancient Yakima fishing place not far from Spearfish and which, like the one at bar, was neither inside nor on the borders of the Yakima Reservation. The lands under and around the fishery had passed into private ownership. Title to the land between high and low water marks, on which the fishing place itself was located, deraigned from a grant by the State of Washington which had ac-

quired these shorelands by operation of law on its admission into the Union "on an equal footing with the original States."[5] Title to the abutting lands had been acquired under patents from the United States. Neither the state grant nor the federal patents referred to the Yakima treaty; nor did they make the conveyances subject to any Indian rights. Winans, the private owner, sought, by fencing his lands, to prevent the Indians from using his property as a means of approach to the fishing place. In addition, he erected a fishing wheel at the fishery itself, acting in this respect pursuant to a license granted him by the State of Washington, and thereby made it impossible for the Indians to catch any fish there even if they could have succeeded in obtaining access thereto.

The United States, as guardian of the Yakima Indians, sued in the United States Circuit Court for the District of Washington to enjoin Winans from maintaining the fence or the wheel and from interfering in any way with the fullest exercise by the Indians of their rights under the Yakima treaty. This Court, reversing the Circuit Court

[5] Act of February 22, 1889, sec. 8 (25 Stat. 676, 679). If the fishing rights provision had been omitted from the Yakima treaty, "the full proprietary right" in these lands would have passed to the state simultaneously upon its admission into the Union. *Pollard* v. *Hagan*, 3 How. 212 (44 U. S.); *Weber* v. *Harbor Commissioners*, 18 Wall. 57 (85 U. S.); *Manchester* v. *Massachusetts*, 139 U. S. 240; *Hardin* v. *Jordan*, 140 U. S. 371, 381; *Shively* v. *Bowlby*, 152 U. S. 1; *Mann* v. *Tacoma*, 153 U. S. 273; *Port of Seattle* v. *Oregon & W. R. R.*, 255 U. S. 56, 63; *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 15–17.

decree which had dismissed the suit on the merits, said (198 U. S. 371, 379, 380–384):

> At the time the treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occupancy to certain lands and to define rights outside of them.
>
> The pivot of the controversy is the construction of the second paragraph. Respondents contend that the words "the right of taking fish at all usual and accustomed places *in common* with the citizens of the Territory" confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the State, and, such being the rights conferred, the respondents further contend that they have the power to exclude the Indians from the river by reason of such ownership. * * *
>
> * * * * * *
>
> The remarks of the court [below] clearly stated the issue and the grounds of decision. The contention of the respondents was sustained. In other words, it was decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give

the word of the Nation for more. And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right without regard to technical rules." 119 U. S. 1; 175 U. S. 1. How the treaty in question was understood may be gathered from the circumstances.

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. They reserved

rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. * * * They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. *And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.* [Italics ours.]

* * * * * *

It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the State upon its admission into the Union. In other words, it is contended that the State acquired, by its admission into the Union "upon an equal footing with the original States," the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could neither grant nor retain

rights in the shore or to the lands under water.

The elements of this contention and the answer to it are expressed in *Shively* v. *Bowlby,* 152 U. S. 1. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the States in and over shore lands were carefully defined, but the power of the United States, while it held the country as a Territory, to create rights which would be binding on the States was also announced, opposing the dicta scattered through the cases, which seemed to assert a contrary view. * * *

* * * * *

The extinguishment of the Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised.

Since the case involved no attempt by the state to regulate the exercise by Yakima Indians of their property rights under the treaty, no question as to the interpretation of Article VI,

clause 2, of the United States Constitution, or as to the effect of the treaty on the state's regulatory power was presented. Consequently, the solitary sentence in the Court's opinion which relates to this fundamental question is a *dictum* uttered without benefit of argument and would in no event be sufficient in itself to foreclose consideration of this question on the merits.[6] This *dictum* does not indicate, much less "conclusively determine," as the state contends (Br. p. 36), that the United States by the Yakima treaty

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[6] That the *dictum* would not have been uttered if the Court had had occasion to give full consideration to the matter is indicated by later decisions of this Court, which swept away doubts expressed in earlier cases as to how far the treaty power could be exercised to cut down a state's police power. It had long been a subject of dispute whether there were any limitations upon the treaty-making power, and there were *dicta* implying the existence of such limits. See, for example, *Ware* v. *Hylton*, 3 Dall. 198; *License Cases*, 5 How. 504 (46 U. S.) (1847); *Passenger Cases*, 7 How. 283 (48 U. S.) (1849); *The Cherokee Tobacco Cases*, 11 Wall. 616 (1870); *Geofroy* v. *Riggs*, 133 U. S. 258 (1890); *Thomas* v. *Gay*, 169 U. S. 264 (1892), and *Downes* v. *Bidwell*, 182 U. S. 244 (1901), decided only a few years before the *Winans* case. Nevertheless, this Court had upheld treaties inconsistent with state inheritance laws in *Hauenstein* v. *Lynham*, 100 U. S. 483 (1879); *Geofroy* v. *Riggs*, *supra*, itself, and *Rocca* v. *Thompson*, 223 U. S. 317 (1912). And subsequent to the decision in the *Winans* case this Court has squarely held that state statutes enacted pursuant to the police power must likewise yield to exercises of the federal treaty power. *Missouri* v. *Holland*, 252 U. S. 416 (1920); *Asakura* v. *Seattle*, 265 U. S. 332, 341 (1924); *Nielsen* v. *Johnson*, 279 U. S. 47, 52 (1929); *United States* v. *Belmont*, 301 U. S. 324, 327, 330, 331 (1937).

either could not or did not cut down in any way the regulatory power which the state otherwise would have. On the contrary, the inference to be drawn from the *dictum* is that the Court recognized that this regulatory power could be and was curtailed to the extent that its exercise would be inconsistent with the full enjoyment of the fishing rights which the Court held the Yakima Indians to have under the treaty. And the very nature of these rights, as interpreted by this Court in the *Winans* case, was clearly such as to entitle the Indians to exercise them without need of obtaining further permission from or paying any further consideration to "the United States and its grantees" or "the State and its grantees." Hence, even if the state, on its admission into the Union, had acquired general power to regulate the manner in which the Indians exercise their treaty fishing rights—such as, to take the state's own example, by a regulation prohibiting the use of dynamite—it still would not have acquired any power to impose regulations which, like the ones involved in the case at bar, prohibit and punish the Indians for exercising their treaty rights at all unless they first get special permission from the state and pay a state fee in order to get it.[7] The state licensing

[7] That the state acquired no regulatory power at all follows, we submit, from the argument under point II, *infra*. The question has been decided in favor of the Indians in four cases, now pending in the lower federal courts, which relate to treaties substantially like the Yakima treaty. In

statute, being directly in conflict with rights which the United States, through an exercise of its treaty powers, has undertaken to secure to the Indians, is directly in conflict with the supreme law of the land and should to this extent have been denied, not granted, enforcement in the state courts below.

We submit, therefore, that the judgment below should be reversed because it was entered in violation of the provisions of Article VI, clause 2, of the Constitution. By that judgment, the state Supreme Court has subjected appellant to criminal punishment under the laws of the State of Washington for doing the very thing which he had a right to do by virtue of a treaty made under the authority of the United States. Instead of following the explicit constitutional mandate that they consider themselves bound by the federal treaty, "any Thing in the Constitution or

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one of these cases a permanent injunction was recently issued protecting the treaty fishing rights of Makah Indians against impairment through the enforcement of any of the regulations in the Washington Fishing Code by state officials. *Makah Indian Tribe et al.* v. *B. F. McCauly et al.*, 39 F. Supp. 75. This case is now on appeal to Circuit Court of Appeals, 9th Circuit. In *Martin J. Sampson et al.* v. *B. M. Brennan et al.*, 39 F. Supp. 74, still pending in the Northern Division, a temporary injunction has been granted. Preliminary injunctions also have been issued by the Southern Division of the United States District Court for the Western District of Washington in *Chief Peter Kalama et al.* v. *Brennan et al.*, and *Quileute Indian Tribe* v. *B. F. McCauly.*

Laws of any State to the Contrary notwithstanding," the state judges actually have considered themselves bound in this case by the state laws anything in the federal treaty and in the federal Constitution to the contrary notwithstanding.

The validity of this conclusion, to the extent that it is not apparent from the plain language of Article VI, clause 2, considered in connection with the *Winans* decision, will be strengthened, not weakened, by a reference to the arguments in the state's brief. Thus, there is no need to dispute the contentions in the state's point I so long as their application is confined to situations which involve no conflict between the state police power or an exercise thereof and an exercise of one or more of the powers granted to the federal government under the Constitution. In the case at bar, however, we are not dealing with such a situation. Here, appellant is relying on the rights secured to him under the Yakima treaty. In entering this treaty, the United States actually exercised three different sets of powers delegated to it under the Constitution—(1) its treaty powers which, as this Court has held, authorize the United States to enter into treaties with Indian tribes just as with foreign nations (*Worcester* v. *Georgia*, 6 Pet. 515; *Holden* v. *Joy*, 17 Wall. 211; *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188; *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Winans*, 198 U. S. 371); (2) the power over the property of the United States (*United States* v. *Winans*,

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supra), and (3) the power to regulate commerce with the Indians.[8] To be relevant in the case at bar, the state's contentions in point I must be taken as suggesting that the state police power or an exercise of it must prevail over an exercise of federal power, to the extent that there is a conflict

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[8] The federal power over commerce with the Indian tribes is broader than over other commerce. 1 Op. Atty. Gen. 645; Prentice and Egan, *The Commerce Clause of the Federal Constitution*, p. 342. In *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188, 194, the power over commerce with the Indian tribes has been declared to be "as broad and as free from restrictions as that to regulate commerce with foreign nations," which, in *Bowman* v. *Railroad Co.*, 125 U. S. 465, was said to be absolute and exclusive. The fact that commerce with Indians may be wholly intrastate does not diminish the federal power over it. *United States* v. *Holliday*, 3 Wall. 407; *United States* v. *Forty-Three Gallons of Whiskey*, *supra*. The constitutional power over commerce with the Indian tribes, as contemporaneously construed by Congress in the Indian trade and intercourse acts dating from 1789, includes the control of hunting, trapping, trespass and various other subjects not necessarily related to transportation, buying or selling. See Cohen, *Handbook of Federal Indian Law* (1941), 69, 91–93, 306–307. But even if the conception of commerce be given its more ordinary significance, the state in this case has been at the same pains to show that appellant *was* engaged in commercial fishing.

There is nothing in *Geer* v. *Connecticut*, 161 U. S. 519, which detracts in any way from the foregoing observations. In that case it was held that a state could prohibit the exportation of game despite the inhibitions of the commerce clause because the ownership of the state in game was said to be absolute. The state can assert no such absolute ownership here, since under the *Winans* decision, its property rights must be considered as having been subject to the profit *à prendre* reserved for the Indians under the Yakima treaty.

between them. Such a suggestion is clearly untenable. This Court has repeatedly held that under Article VI, clause 2, it is the exercise of federal power that must prevail and the state police power which must yield when and to the extent that the two come in conflict.* Moreover, it is now definitely settled that the same principle applies where an exercise of the federal treaty power conflicts with and therefore curtails the state police power (see note 6, p. 18, *supra*. Indeed, the case of *Prigg* v. *Pennsylvania*, 16 Pet. 539, cited by the state, is one of the classic decisions which first enunciated the doctrines of incidental federal powers and of the supremacy of their exercise over the state police power. In that case, this Court actually held a Pennsylvania statute punishing the kidnapping in the state of escaped slaves to be unconstitutional and void because it conflicted with a federal law enacted by Congress pursuant to Article IV, section 2, of the Constitution.

The contention in point II of the state's brief similarly are valid only to the extent that they are immaterial to the issues in this case, and invalid to

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* *Henderson, etc.* v. *Mayor of New York*, 92 U. S. 259, 271; *Railroad Co.* v. *Husen*, 95 U. S. 465, 471; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661; *Walling* v. *Michigan*, 116 U. S. 446, 460; *Leisy* v. *Hardin*, 135 U. S. 100, 108; *McCray* v. *United States*, 195 U. S. 27, 60; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 25; *Adams Express Co.* v. *New York*, 232 U. S. 14, 31; *Charleston & Western Carolina Ry. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597; *Adams* v. *Tanner*, 244 U. S. 590, 594–595; *Buchanan* v. *Warley*, 245 U. S. 60, 74; *Looney* v. *Crane*, 245 U. S. 178, 187; *Panhandle Co.* v. *Highway Commission*, 294 U. S. 613, 619.

the extent that they can conceivably be considered as material.

Taken in connection with the contentions in points V and VI, it may be assumed that the state licensing statute is an exercise of the police power and for that reason not subject to successful attack under the due process or contract clauses of the Constitution by anyone whose rights are impaired by reason of its enactment and enforcement. But appellant is not attacking them on either of these grounds on this appeal. His rights are entitled to protection by virtue of a treaty made under the authority of the United States which, under Article VI, clause 2, is a part of the supreme law of the land, anything in the laws of the State of Washington to the contrary notwithstanding. It is no answer to this challenge that appellant could not in addition successfully attack the statute under the due process or contract clauses.

The gist of the state's contentions in point III is contained in the following excerpt from pages 16 and 17 of its brief:

> Under the decisions of the Supreme Court of the United States, Congress was without power to admit the State of Washington into the Union shorn of the right to protect its wild game and fish upon land and waters, otherwise subject to its jurisdiction.
>
> The power of Congress to impose binding limitations upon the sovereignty of new states is not an unlimited power. The existence of a new state as an independent

sovereignty imports certain inherent powers which cannot be restricted either by express provision in the Enabling Act *or by prior treaties*. If such treaties exist at the time the new state is admitted, then the admission repeals the treaty to that extent.

The pronouncements of our supreme court provide a basis for the rule which may be succinctly stated as this: Congress can only impose those limitations upon the sovereignty of a new state which it might impose after admission under the powers granted to it by the Federal Constitution, and that any other attempted limitation cannot be enforced. While there are numerous decisions sustaining this principle, no case furnishes a clearer enunciation of the rule than that of *Coyle* v. *Smith*, 221 U. S. 559 * * *. [Italics ours.]

The *Coyle* case dealt exclusively with the power of Congress, under Article IV, section 3, to admit new states into the Union. It is typical of the many cases theretofore and thereafter decided by this Court which in effect have held that this particular power is subject to an implied limitation which prohibits its use as a means of preventing a newly admitted state from exercising powers or acquiring rights peculiarly local in their nature and of which the United States could not deprive the states after their admission through a valid exercise of any of its delegated powers. In the case at bar it must be admitted that the power of a state to regulate fishing in its waters is such a

power. It must also be admitted that the right of a state to proprietary ownership of the land between high and low water marks in its navigable streams is such a right. If, therefore, the federal action impairing this local regulatory power or this proprietary right were based, in the case at bar, merely upon the power of Congress under Article IV, section 3, to admit new states into the Union it could not and would not have been effective. But it was not based merely on that power. Indeed, the restrictions on the state's proprietary ownership of the shore lands on which the fishery here in question was situated results not from any provision in the Washington Enabling Act but from the provisions in the Yakima treaty into which the United States had authority to enter pursuant to at least three separate powers specifically delegated to it under the Constitution. In order to sustain its position, therefore, the state must establish that a similar limitation exists upon these powers as upon the power to admit new states or it must establish that the doctrine of equality of admission amounts not merely to a limitation on Congress' power to produce inequalities through abuse of its admitting power, but to a positive requirement that Congress see to it that every new state is admitted on a basis of absolute equality with those already in the Union.

Even in *Coyle* v. *Smith* this Court went out of its way to point out that no such extension of its

decision would be proper, saying (221 U. S. 559, 574):

> It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, or with Indian tribes situated within the limits of such new State, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1, 9. *Pollard's Lessee* v. *Hagan*, *supra*.
>
> No such question is presented here. * * *

Ignoring this plain statement, the state quotes the following paragraph from page 576 of the opinion:

> In *Ward* v. *Race Horse* [163 U. S. 504], the necessary equality of the new State with the original States is asserted and maintained against the claim that the police power of the State of Wyoming over its wild

> game had been restricted by an Indian treaty made prior to the admission of the State of Wyoming.

and asserts (Br., p. 19):

> We regard this statement as absolutely decisive on the point that the State of Washington acquired supreme control over its wildlife when statehood was declared. In substance it holds that it is not competent for Congress to impose upon a sovereign state limitations upon its police power with respect to its wild game upon lands not included in an Indian reservation, by treaties with the Indian tribes; and that however valid those treaties might have been in their inception, they are of necessity repealed to that extent by the admission of the state.

We need not dignify this assertion with any direct argument to show how far from "absolutely decisive" the paragraph on which the state relies would be even if the state has properly interpreted its meaning. But since the *Race Horse* case is one of the mainstays of the state's case and of the majority opinion below, we shall examine the facts and the opinion in that case with care in order to determine how far it supports the state's contentions. In that case, a member of the Bannock tribe of Indians, who was being prosecuted in a Wyoming court for having killed "seven elk illegally, wantonly and in excess of the number he could immediately use for food purposes" in violation of a Wyoming statute, obtained his discharge on *habeas*

corpus in a United States Circuit Court on the ground that his conduct was justified under a treaty between the United States and the tribe. The treaty provided that its members—

> * * * shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

The place where Race Horse had killed the elk was part of the "unoccupied lands of the United States" within the boundaries of the State of Wyoming which had been admitted into the Union some 31 years after the entry into the treaty. This Court reversed the order and remanded the Indian to the custody of the state sheriff.

In scrutinizing the majority opinion, written by Mr. Justice White, it may be difficult to distinguish what portions of it properly should be considered part of the *ratio decidendi* and what part *dicta;* but two things certainly are clear, (1) that everything in it was directed to the single ultimate conclusion on which the decision to reverse was based, and (2) that this conclusion was that the hunting rights reserved for the Bannock Indians under the treaty came completely to an end at the very moment the State of Wyoming was admitted into the Union. The first four pages of the opinion (pp. 507–510) contain the reasoning directly leading up to the decision. This reasoning deals wholly with the question

whether the hunting rights provision, properly interpreted, should or should not be held to have expired by its own terms when Wyoming attained statehood. Starting with the words in the treaty referring to "peace * * * among the whites" and "borders of the hunting districts," the learned Justice unfolded a process of interpretation which led him, by steps whose precise nature it is not necessary to recount here, to the conclusion that the treaty actually was intended, not to give the Indians a right to hunt on unoccupied lands of the United States so long as they remained unoccupied lands of the United States, but only so long as they did not fall within the boundaries of a full-fledged state of the Union. This being so, the treaty right came to a complete end by virtue of its own provisions at the very moment the State of Wyoming was admitted to the Union, leaving the state legislature free to regulate hunting by the Bannock Indians without thereby impairing their treaty rights and hence without violating Article VI, clause 2, of the Constitution.

Thus, the Court's decision was not based on any holding that the treaty right, though continuing in existence as a mere property right after Wyoming became a state, nevertheless was "repealed" to the extent necessary to permit the state to regulate it without interference from Article VI, clause 2, of the Constitution. The same is true of the discussion in the rest of the opinion which seeks to support the Court's holding that the treaty right had

wholly ceased to exist. The opinion points out that an interpretation, under which the treaty hunting rights could continue in existence after Wyoming became a state, would cut down the state's police power and should not be adopted by the Court if some way could be found for preventing this by destroying the treaty right through a so-called process of interpretation. Here, too, the opinion assumed the very opposite of what the state asserts it held. There is not the slightest suggestion that the judges in the Wyoming courts could, without violating Article VI, clause 2, of the Constitution, have enforced the state conservation statutes against Race Horse if his hunting rights under the treaty had not, by virtue of the intention supposedly expressed in the treaty itself, gone completely out of existence the very moment the state came into being. On the contrary, the whole burden of Mr. Justice White's reasoning was that if the treaty right had not gone wholly out of existence it would, by preventing the state judges from enforcing these state conservation laws against the Indians, have cut down the power which the state legislature otherwise would have had to regulate all hunting within its borders.

Furthermore, Mr. Justice White's reasoning as to the effect of the enabling act reduces itself to the thesis that since the treaty right came to an end by virtue of its own limitations, the mere failure of Congress to say anything about the matter could not and did not serve to prevent its termina-

tion. The following excerpts from the opinion clearly show that the Court did not intend to suggest, much less to hold, that the United States could not by treaty or act of Congress create rights, prior to the admission of a state into the Union, which would survive thereafter, and by reason of Article VI, clause 2, of the Constitution cut down rights and powers which the state otherwise would have acquired by virtue of its admission into the Union on a basis of equality with the other states:

> * * * Nor would this case be affected by conceding that Congress, during the existence of the Territory, had full authority in the exercise of its treaty-making power to charge the Territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a Territory it would be also within the power of Congress to continue them in the State, on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the State, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission. Indeed, it may be further, for the sake of the argument, conceded that where there are rights created by Congress during the existence of a Territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission, such continuation will,

> as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of a limited duration. * * *

The majority opinion in the state Supreme Court below rightly asserts that "The *Race Horse* case is strikingly like that here presented." But the same resemblance existed in the *Winans* case and was just as material to the questions there presented and decided. Whether the decision of this Court in the *Winans* case represents a direct rejection of the decision in the *Race Horse* case or whether the Court merely deemed the provisions of the Yakima treaty not susceptible to the interpretation given the Bannock treaty, the fact remains that the *Winans* case has established that the right of the Yakima Indians "of taking fish at all usual and accustomed places" outside of the Yakima Reservation "was intended to be continuing against the United States and its grantees as well as against the State and its grantees," and therefore survived the admission of the state into the Union.

The state's suggestion that it survived as a mere property right but was repealed by implication in some undefined way so as to permit the state to impair its enjoyment and exercise despite the pro-

visions of Article VI, clause 2, of the Constitution is just a novel way of repeating the contentions already dealt with that the state police power is paramount over an exercise of federal power to the extent of a conflict between them. Indeed, it represents an extension of that untenable argument, for it asserts that it is not necessary even to wait for a conflict to occur between the valid exercise of federal power and an actual exercise of state power. The mere admission of the state into the Union is enough, according to the state's argument, to invalidate every law theretofore validly enacted by Congress and every treaty validly entered into by the United States to the extent that its continued existence after the creation of the state would, because of Article VI, clause 2, prevent the state legislature from acquiring the rights and exercising the powers which it would have obtained had these laws and treaties not been in existence. This very argument was made and flatly rejected in the *Winans* case with respect to the complete proprietary ownership which the State of Washington, but for the Yakima treaty, would have obtained in the shorelands underlying its rivers. The attempt of the state to distinguish that decision, by intimating that there is some sort of hierarchy of state sovereign rights and powers according to which the state police power is a higher attribute of sovereignty than the ownership of shorelands and tidelands, requires no serious consideration in the light of the many

decisions of this Court reaching the same conclusion in cases where the police power was the attribute of sovereignty in question as in cases where other state powers or sovereign rights were involved. *Johnson* v. *Gearlds*, 234 U. S. 422; *Ex parte Webb*, 225 U. S. 663; *United States* v. *Pelican*, 232 U. S. 442. See also *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188; *Sperry Oil & Gas Co.* v. *Chisholm*, 264 U. S. 488; *United States* v. *McGowan*, 302 U. S. 535. Furthermore, since the United States has power to cut down a state's police power by an appropriate exercise of its treaty powers when the state is already in existence (see note 6, p. 18, *supra*), the very starting point of the state's argument is itself invalid. As this Court said in *Johnson* v. *Gearlds, supra* (234 U. S. 422 at 439):

> * * * But if the making of such a treaty after the admission of the State is not inconsistent with the "equal footing" of that State with the others—as, of course, it is not—it seems to us to result that there is nothing in the effect of "equal footing" clauses to operate as an implied repeal of such a treaty when previously established.

There are intimations in the state's brief (pp. 12, 42) and in the majority opinion of the state Supreme Court (R. 17) that appellant cannot prevail unless the Yakima treaty itself provides that his fishing rights may be exercised without compliance with state laws. This, we submit, is an erroneous

assumption. The protection of the treaty right against impairment by reason of any state law is provided for in Article VI, clause 2, of the Constitution and need not be reinforced in every instance by an affirmative provision against state regulation in the federal treaty or law covering the right.[10] This does not mean, of course, that a conflict necessarily occurs in every case where a state regulation is applied to a treaty right, for it sometimes may be proper to interpret the treaty as conferring a right or privilege which was intended to be subject to state regulation.

Thus, if the United States entered into a treaty with the Dominion of Canada in which Canadians were granted the right to fish in the part of the Columbia River where it flows through the State of Washington "in common with" the citizens of that state, and the citizens of Washington were granted the right to fish in the Columbia River where it flows through Canada "in common with" citizens of the Dominion, it might be proper to hold that the fishing rights granted to the Canadians were intended to be exercised subject to

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[10] In *Winters* v. *United States*, 207 U. S. 564, 577, this Court said:

"* * * On account of their relations to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them."

such regulations in the interests of conservation as are generally applicable under the Washington laws. While the United States would have had power to preclude the applicability of the state laws, it would be reasonable, in the absence of a specific provision, to hold that the treaty was not intended to do so. Several circumstances would combine to support such an interpretation. The situation prior to the treaty was one where citizens of Canada either had no right at all or certainly no right that was free from state regulation. The state was in existence, and its power and functions and authority well known. It, therefore, would be reasonable to assume, in the absence of a specific provision precluding state regulation, that it was not intended to grant a right free from regulation where none had been enjoyed before.

A very different situation existed, however, in the case at bar. As this Court pointed out in the *Winans* case, the Indians prior to the treaty possessed full rights of occupancy "upon the exercise of which there was not a shadow of impediment." Had the state been in existence, these rights admittedly would not have been subject to state regulation. Thus the treaty is relied on, not by the Indians as the source of their rights, but by the state as the basis for its regulatory power; and the treaty provisions must be looked at to see how far they affirmatively curtailed the Indian rights rather than how far they

granted them. Furthermore, the State of Washington did not come into existence until some 34 years after the treaty between the United States and the Yakima Nation of Indians was concluded.[11] When the treaty was entered into the Yakima Indians had not the slightest conception of state sovereignty or of the division of powers between state and federal governments under our Constitution. In such a situation, it would be fantastic to interpret their failure to provide against state regulation as indicating an intention that the rights secured to them under the treaty were to be subject to state regulation; and even if there were any room for reasonable doubt, these doubts would, under the canons of interpretation properly applicable with respect to Indian treaties, have to be resolved in favor of the Indians and in conformity with their understanding of the transaction.[12]

Furthermore, any contention that the treaty affirmatively conferred power on the Territory of Washington to regulate fishing by the Indians at

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[11] Act of February 22, 1889, 25 Stat. 676; 1 Rem. Rev. Stat. Wash., 347.

[12] *United States* v. *Winans*, *supra*; *Worcester* v. *Georgia*, 6 Pet. (31 U. S.) 515 (1832); *The Kansas Indians*, 5 Wall. 737; *Jones* v. *Meehan*, 175 U. S. 1 (1899); *Winters* v. *United States*, 207 U. S. 564 (1908); *United States* v. *Nice*, 241 U. S. 591; *Choate* v. *Trapp*, 244 U. S. 665; *Funk* v. *County Commrs.*, 248 U. S. 399; *Seufert Bros. Co.* v. *United States*, 249 U. S. 194; *United States* v. *Shoshone Tribe*, 304 U. S. 111 (1938).

their "usual and accustomed places" in streams which neither flow through nor border on the reservation because at such places the right to fish was secured to them "only in common with the citizens of the Territory" must be rejected in the light of the interpretation of this provision of the treaty adopted in the *Winans* case. The state concedes (Br. p. 48) that the treaty cannot be considered as having been entered into for the benefit of the non-Indian citizens of the territory or as having been intended to confer any rights upon them. It is equally true that the treaty was not intended to eliminate the right of the Indians by reducing it to the level of the citizens of the territory. Thus, while it would be possible, purely as a matter of grammar, to regard the phrase "in common with citizens of the Territory" as modifying either the word "right" or the words "taking fish," the dictates of common sense, as well as the decision of this court in the *Winans* case, establish that the latter is the proper interpretation. Thus, the most that can be inferred from its inclusion in the treaty is that the Indians were giving up the right to exclude the whites from fishing on the tracts being conveyed by them to the United States, not that they were sharing their rights with the whites on the same or equal terms. Therefore, it does not follow that because fishing by the whites was subject to regulation by the territory, fishing by the Indians also was subject to such regulation. *Fish-*

ing by the Indians, being secured to them under a federal treaty, was under the special protection of the United States and hence subject to regulation, if at all, only by the Congress of the United States. Fishing by the citizens of the territory was neither secured by a treaty nor under the special protection of the United States, and was therefore freely subject to regulation by the territory. The same became true with respect to the State of Washington when it succeeded the territorial government.

The situation presented in *Kennedy* v. *Becker*, 241 U. S. 556, falls somewhere between the two extremes represented by the case at bar and the hypothetical Canadian treaty.[13] The State of New York not only was in existence but its sovereignty was, as

[13] The opinion of the Solicitor of the Department of the Interior dated April 5, 1934 (54 I. D. 418), to the effect that the Yakima Indians are not exempt, by reason of the 1855 treaty, from the provisions of the Oregon laws for licensing the sale of fish, is based upon what is now believed to have been a misunderstanding of the opinions of this Court in *Kennedy* v. *Becker* and the *Winans* case, *supra*. This opinion, however, expressly distinguished between the right to sell fish and the right to take fish. The Acting Solicitor of the Interior Department subsequently ruled that the right to take fish outside the reservation, having been guaranteed by treaty, was entitled to special federal protection and therefore that Indians were entitled to compensation, when such fishing sites were flooded by construction of the Bonneville Dam, even though non-Indian riparian owners were not so entitled. [The opinion referred to is not reported but copies have been filed with the Clerk.] Pursuant to this ruling the War Department offered, and the Tribal Council of the Yakima Reservation (by resolution dated August 9, 1939, approved on behalf

this Court took special pains to point out, well understood by the Indians. On the basis of that case, it can and should be held in the case at bar that the Yakima Indians subjected themselves to the sovereignty of the United States and that Congress can, without violating the treaty, regulate the exercise of the fishing rights secured to the Indians under the Yakima treaty. This would be true with respect to fishing inside as well as outside the reservation. But even the United States could not without violating the treaty impose the particular requirements corresponding to those provided for in the state licensing statute, for such requirements are inconsistent with the very nature of the rights secured to the Indians under the treaty. If the fishing rights provision means anything at all, it means that the Indians obtained a right to fish at their usual and accustomed places without need of further permission and without need of further payments in addition to the very substantial consideration furnished by them under the treaty itself. The United States, it is true, has power to violate the treaty; but the State of Washington does not, since

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of the Department of the Interior by the Superintendent of the Reservation), accepted proposals for lieu lands in compensation, which, at the request of the War Department, have since been embodied in the now pending bill, H. R. 5993, 77th Cong., favorably reported on November 21, 1941, by the House Committee on Rivers and Harbors. (H. Rept. No. 1431, 77th Cong., 1st sess., p. 97.) The resolution setting forth this arrangement specifies that the lands to be granted in compensation are to be held by the United States "in trust for the exclusive and perpetual use of the Indians."

this power has been denied to it by Article VI, clause 2, of the Constitution.

II

THE STATE LICENSING STATUTE, AS IT HAS BEEN INTERPRETED AND APPLIED TO APPELLANT, IS REPUGNANT TO THE FEDERAL CONSTITUTION BECAUSE IT ATTEMPTS TO REGULATE A SUBJECT MATTER UNDER THE SPECIAL PROTECTION AND WITHIN THE EXCLUSIVE JURISDICTION OF THE UNITED STATES.

While the Yakima Indians had no conception whatsoever concerning the nature of state sovereignty or government, the record of the negotiations leading up to the treaty does indicate a definite realization on their part that they were dealing with representatives of the President of the United States, "the Great White Father" in Washington, that they were entering into a treaty which would have to be approved by the United States, and that this treaty provided for much more than a business transaction whereby, with specified exceptions, they were surrendering all their use and occupancy rights and receiving in return the promise of certain stipulated payments and material benefits (R. 71–137). Implicit in the very nature of the promised benefits and actually expressed in the treaty itself were the subordination by the Indians of their own sovereignty and powers as a nation to those of the United States, and the solemn undertaking by the United States to protect and secure the Indians in the exercise and enjoyment of the property rights reserved by and for them under the treaty. In this respect,

this treaty was entirely unlike the so-called treaty in *Kennedy* v. *Becker, supra,* and just like the hundreds of other treaties which the United States has made with other Indian tribes and which this Court has uniformly treated as placing the Indian property rights under the control and guardianship of the United States. In this respect, also, there is no basis for differentiating between the fishing rights secured to the Indians inside the reservation and those outside. Both, as this Court held in the *Winans* case, involved property rights; both were entitled to the federal protection which the United States obligated itself to afford under the treaty; both fall within the protective provisions of the general laws which Congress has enacted with respect to all Indian rights in land;[14] and both have been the subject of protection at the hands of the executive branch of the government from the time of the entry into the treaty to this very day.

Such a protective relationship, it has consistently been held by this Court, suffices in and of itself to place the property, activity, or other subject matter enjoying the special federal protection, under the *exclusive* jurisdiction of the

[14] The basic federal statute (R. S., sec. 2116, 25 U. S. C. 177), protecting Indian land rights, applies to every type of interest in land.

"This statutory provision is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold." (18 Op. Atty. Gen. 232, 237.)

United States. *Worcester* v. *Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 Wall. 737; *The New York Indians*, 5 Wall. 761; *United States* v. *Forty-Three Gallons of Whiskey*, 93 U. S. 188; *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Thomas*, 151 U. S. 577; *United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Sutton*, 215 U. S. 291; *Clairmont* v. *United States*, 225 U. S. 551; *United States* v. *Sandoval*, 231 U. S. 28; *United States* v. *Pelican*, 232 U. S. 442; *Perrin* v. *United States*, 232 U. S. 478; *Johnson* v. *Gearlds*, 234 U. S. 422; *United States* v. *Nice*, 241 U. S. 591; *Blanset* v. *Cardin, as Guardian*, 256 U. S. 319; *Sperry Oil & Gas Co.* v. *Chisholm*, 264 U. S. 488; *United States* v. *McGowan*, 302 U. S. 535.

Exclusive jurisdiction does not depend on the place where the property is located or the activity carried on. It exists as to the particular property, activity, or other subject matter under federal protection even though no Indian reservation is involved and even though the place and subject matter is fully subject to state power and law except for the Indian property or activities being carried on there under special federal protection provided for in a treaty or law of the United States. *The Kansas Indians, supra; United States* v. *Forty-Three Gallons of Whiskey, supra; United States* v. *Thomas, supra; United States* v. *Rickert*, 188 U. S. 432; *Tiger* v. *Western Invest-*

ment Co., 221 U. S. 286; *United States* v. *Pelican, supra; Perrin* v. *United States, supra; Johnson* v. *Gearlds, supra; United States* v. *Nice, supra; Blanset* v. *Cardin, supra; Sperry Oil & Gas Co.* v. *Chisholm, supra; United States* v. *McGowan, supra.* A similar situation exists where Indian reservations are involved, but where they are located on territory wholly subject to state jurisdiction except with respect to Indian property and activities carried on under federal protection. *United States* v. *McBratney*, 104 U. S. 621; *United States* v. *Kagama, supra; Draper* v. *United States*, 164 U. S. 240; *United States* v. *Celestine, supra; United States* v. *Sutton, supra; Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Pelican, supra; United States* v. *McGowan, supra.*

In the case at bar, the state Supreme Court has recognized (R. 17, 18) the absence of state jurisdiction over the fishing activities of the Indians at the fishing places which, though actually outside of the reservation, happened to be located in streams contiguous to its boundaries. We submit that it is equally true with respect to the usual and accustomed places outside the reservation and not contiguous to its boundaries. The protective interest of the United States evidenced in and by the Yakima treaty, extends to the restricted property rights and fishing activities of the Indians at all these places; and these rights and activities, in ac-

cordance with the rule established and applied in the cases just cited, are therefore under the *exclusive* jurisdiction of the United States. If, as may be conceded, power to regulate them exists at all outside of the Yakima tribal authorities, it can be exercised only by the Congress and not by the Legislature of the State of Washington.

The decision in *Kennedy* v. *Becker*, 241 U. S. 556, does not militate against this conclusion. In that case the Seneca Nation of Indians in 1797 conveyed certain land in the State of New York to Robert Morris by a grant which reserved "to them * * * and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed." Under an act of Congress in force at the time, it was unlawful for any white person to purchase land from the Indians unless the transaction was approved and ratified through a formal treaty with the United States. It was for this reason that this purely private transaction was approved and ratified by a treaty with the United States. No land was conveyed to the United States by the Indians under the treaty; nor were any rights guaranteed or secured to the Indians by the United States. All the United States purported to do and did do was to determine that the particular transaction between the Seneca Indians and Robert Morris was not inimicable to their interests and could therefore be given legal effect. The function performed by the United States under this treaty was no different than the

function now performed by the Secretary of the Interior whose approval is required before certain types of contracts entered into by the Indians can become effective. Once the approval is granted, the governmental purpose is fully achieved and the governmental interest and function in the transaction ceases. (*In re Sanborn*, 148 U. S. 222, 227; *United States* v. *Algoma Lumber Co.*, 305 U. S. 415.)

This is very different from the situation involved in the case at bar in which the Indians conveyed their land directly to the United States and in which the United States itself undertook a continuing obligation to secure to the Indians the fishing rights reserved for them under the treaty. In the *Becker* case no such basis existed for establishing that the State of New York was powerless to regulate the fishing by the Indians on the lands conveyed to Robert Morris; and no such suggestion was even made on behalf of the Indians. The contention of the Seneca Nation was that by virtue of its agreement with Robert Morris the Seneca Nation had reserved for itself exclusive power to regulate the exercise by its members of the fishing rights reserved under the grant. The opinion in the *Becker* case took special pains to point out the limited nature of this contention; and in deciding against its validity, the Court certainly did not foreclose the very different question involved in the case at bar, i. e., the question as to the exclusive jurisdiction, not of the Yakima Nation of Indians,

but of the United States, by reason, not of its mere stamp of approval on a conveyance by the Indians to a private person, but of its own participation in the Yakima treaty as the contracting party to whom the conveyance was being made and by whom the assurances of continued federal protection of the reserved fishing rights were being given.

The state's contentions (Br. pp. 54–59) concerning the effect of the admission of the Yakima Indians to citizenship were not adopted in the court below and should be rejected here. If this factor has any relevancy, it must be because in some way not clearly suggested by the state the attainment of citizenship curtailed the powers and responsibilities of the federal government with respect to the Yakima fishing rights or expanded the state powers or responsibilities in the same field. Neither of these possibilities is supportable under the decisions of this Court.

The thought that citizenship is incompatible with wardship so that the grant of citizenship terminates the guardianship relation of the federal government towards the members of an Indian tribe is found in a number of early cases, notably in *Matter of Heff*, 197 U. S. 488 (1905). This case, however, as the appellee recognizes (Br. pp. 57, 58), was expressly overruled in *United States* v. *Nice*, 241 U. S. 591 (1916), in which the Supreme Court declared:

> Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection (p. 598).

To the same effect are: *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Noble*, 237 U. S. 74, 79; *Williams* v. *Johnson*, 239 U. S. 414; *United States* v. *Sandoval*, 231 U. S. 28, 48; *Winton* v. *Amos*, 255 U. S. 373; *United States* v. *Boylan*, 265 Fed. 165 (C. C. A. 2d), app. dism. 257 U. S. 614 (1921); *Farrell* v. *United States*, 110 Fed. 942 (C. C. A. 8th); *Beck* v. *Flournoy Live-Stock and Real Estate Co.*, 65 Fed. 30 (C. C. A. 8th).

Just as the fact of citizenship does not impair federal constitutional powers, so it does not detract any force from the actual exercise of those powers. If the grant of citizenship to the members of the Yakima Tribe had the effect of dissolving the tribal relation, then conceivably it might be argued that a promise of fishing rights to the Yakima Tribe was deprived of its force with the dissolution of the tribe. But it has been held repeatedly that the grant of citizenship does not dissolve tribal relations. *United States* v. *Nice*, *supra*; *Tiger* v. *Western Investment Co.*, *supra*; *United States* v. *Boylan*, *supra*. Accord: *Farrell* v. *United States*, 110 Fed. 942 (C. C. A. 8th).

The question of state constitutional power is closely related to the question of federal constitutional power, and several of the cases already cited as showing the continuance of federal control over citizen Indians may also be cited as showing that the grant of citizenship does not confer upon a state any constitutional power to regulate, tax, or otherwise interfere with Indian property that is subject, as are the property rights in this case, to federal restrictions upon alienation. See for example *United States* v. *Nice, supra,* at pages 597–598; *United States* v. *Boylan, supra,* at page 174. To the same effect is *United States* v. *Rickert,* 188 U. S. 432 (1903), in which an injunction was issued, at the suit of the United States, to prevent the state taxation of lands, improvements, and personal property used in connection with such lands, in which Indians allotted under the general allotment act, and therefore citizens, had a beneficial interest. And see *United States* v. *Sutton,* 215 U. S. 291, 295–296, in which the Supreme Court held that the protective relation of the federal government to the Yakima Indians had not been impaired by the conferring of statehood on Washington, and that the "police power" of the state did not supersede federal protection.

The foregoing considerations compel the conclusion that the citizenship of the Yakima Indians does not serve to confer upon the State of Washington any power to control, regulate, or interfere with restricted property which is under the pro-

tection of the federal government, such protection having been promised by solemn treaty and implemented by federal legislation.

It is equally plain that the conferring of citizenship does not bring the Yakima Indians within the application of any state laws that did not apply to them before they were citizens. The fact of the matter is that citizenship is no part of the offense, under state law, of which the appellant has been convicted. The law applies, on its face, to aliens as well as citizens. Therefore the citizenship of the appellant has nothing to do with the case. Certainly it has no bearing upon the questions of state power or state law. And we have already seen that it has no bearing upon the question of federal power or federal law.

CONCLUSION

It is submitted that the judgment appealed from should be reversed.

Respectfully,

NATHAN R. MARGOLD,
Solicitor for the Department of the Interior.

The Solicitor General authorizes the filing of the foregoing brief prepared on behalf of the appellant, an Indian ward, by the Solicitor for the Department of the Interior.

CHARLES FAHY,
Solicitor General.

FEBRUARY 1942.

APPENDIX

STATE STATUTES INVOLVED

The state statute, the validity of which is directly involved, is referred to in the record as Section 5703 of Remington's Revised Statutes of Washington (vol. 7, 1940 pocket supp.). This is a codification of Chapter 149 of the Session Laws of the State of Washington of 1937 (1937 Wash. L., pp. 529–534), which, so far as pertinent, provides:

> SECTION 1. That section 51 of chapter 31 of the Laws of 1915 as amended by section 1, chapter 63, of the Laws of 1921, be amended to read as follows:
>
> SEC. 51. Licenses herein required shall be issued to any qualified person, firm, or corporation, by the director of licenses, or his duly authorized deputy, upon the receipt of a lawful application therefor, upon a blank to be furnished for that purpose, accompanied by the receipt of the state treasurer for the required fee, and the director of licenses shall cause to be endorsed on such application the number of the license issued and the date of issue, and transmit the application to the director of fisheries. All applications for licenses shall be filed with the state treasurer, accompanied by the proper fees, which shall be respectively as follows:
>
> * * * * *
>
> For each dip bag net license for the taking of salmon on the Columbia River, five dollars ($5.00);
>
> * * * * *

SEC. 2. This act is necessary for the support of the state government and its existing public institutions, and shall take effect March 31st, 1937.

In addition, sections 5693 and 2266 of Remington's Revised Statutes of Washington are relevant. These respectively provide as follows:

SEC. 5693. *Fishing without license prohibited.*—It shall be unlawful to catch, take, or fish for food fish with any appliance or by any means whatsoever except with hook and line commonly called angling or trolling, unless license so to do has been first obtained from the commissioner.

* * * * * *

Any person who shall engage in fishing with any appliance whatsoever without having first obtained a license or made lawful application therefor shall be deemed guilty of a misdemeanor and the commissioner is hereby authorized to seize said appliance and the same shall be confiscated to the state [L. '15, p. 81, sec. 41].

SEC. 2266. *Punishment of misdemeanor when not fixed by statute.*—Every person convicted of a misdemeanor for which no punishment is prescribed by any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for not more than ninety days, or by a fine of not more than two hundred and fifty dollars [L. '09, p. 894, sec. 14].

U. S. GOVERNMENT PRINTING OFFICE: 1942

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 318

SAMPSON TULEE,

Appellant,

vs.

STATE OF WASHINGTON.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

APPELLEES' STATEMENT AS TO JURISDICTION.

SMITH TROY,
Attorney General of Washington,
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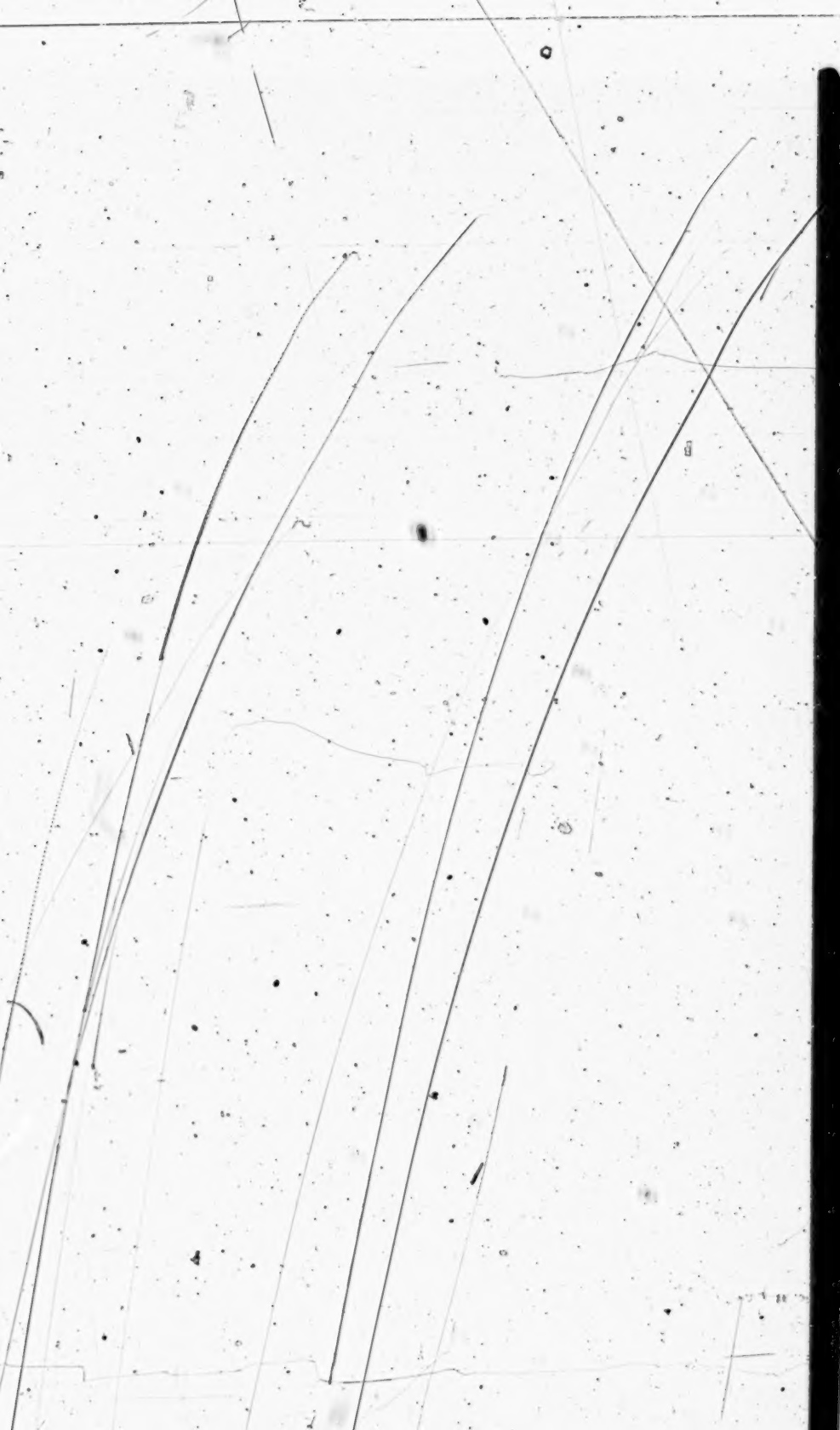

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Pursuant to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, appellee respectfully apprises this Honorable Court that in its considered opinion the present controversy presents a Federal question clearly within the contemplation of Section 237 (a) of the Judicial Code of the United States (28 U. S. C. 344 (a)), as amended by the Act of February 13, 1925, c. 229 (43 Stat. 936), by the Act of January 31, 1928, c. 14 (45 Stat. 54), and by the Act of April 26, 1928, c. 440 (45 Stat. 466), and that this court has jurisdiction upon this appeal to review the judgment of the Supreme Court of the State of Washington.

Facts.

A complete chronological history of the case is presented in appellant's statement as to jurisdiction. Further elaboration would serve no useful purpose.

While we take a wholly contrary position to the appellant as far as the law is concerned and the applicability of the decisions bearing on the merits of the case, at the proper time controverting argument will be presented. Suffice it to say that we concur in appellant's contention that a Federal question is involved, namely, that of the alleged repugnance of the fish and game statutes of the State of Washington to the Stevens' Treaty of 1855, and which was passed upon by the Supreme Court of the State of Washington in reaching its judgment.

Authorities Believed to Sustain Jurisdiction on Appeal.

We think the pronouncement of this court in *Murray* v. *City Council of Charleston*, 96 U. S. 432, 24 L. Ed. 760, is directly in point. We quote from page 441 of the decision:

> "In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the State court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held that we may review the judgments of a State court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised. In *Crowell* v. *Randall* (10 Pet. 368), it was laid down, after a review of almost all our previous decisions, 'that it is not necessary the question should appear on the record to have been raised, and

the decision made in direct and positive terms, *in ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment.' This case was followed by *Armstrong et al.* v. *The Treasurer of Athens County* (16 id. 281), where it was held sufficient to give this court jurisdiction if it appear from the record of the State court that the Federal question was necessarily involved in the decision, and that the court could not have given the judgment or decree which they passed without deciding it. See also *Bridge Proprietors* v. *The Hoboken Company*, 1 Wall. 116, and *Furman* v. *Nichol*, 8 id. 44."

We believe, further, that the following cases sustain the jurisdiction of the Supreme Court of the United States:

In re Slaughter House Cases, 77 U. S. 273, 19 L. Ed. 915;

New Orleans & N. E. R. Co. v. *Scarlet*, 249 U. S. 528, 39 S. Ct. R. 369;

Longest v. *Langford*, 274 U. S. 499, 47 S. Ct. R. 668;

People of the State of New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 49 S. Ct. R. 61.

Importance of the Case.

On its face, this case may not appear to be of any special significance. The case, however, is of far greater importance than disclosed by the record. The particular treaty provision which furnishes the basis of the controversy is common to all the Indian treaties effectuated with the several tribes residing in the State of Washington as far as we are able to ascertain.

Four injunction suits are now pending in the Federal District Courts in Washington to restrain the State from interfering with Indian commercial fishing exploitations outside the reservations, based on the identical language of the Stevens' Treaty involved in the case at bar.

The interpretation of the Supreme Court of the State of Washington in an unbroken line of decisions is adverse to the Indians' position. On the other hand, Federal Courts in the Western District of Washington, in both the Northern and Southern Divisions, have granted temporary injunctions suspending the operation of the State laws in the waters over which the State of Washington has jurisdiction, and the District Court for the Western District of Washington, Northern Division, entered a permanent injunction on June 2, 1941 (*Makah Indian Tribe, et al.*, v. *B. F. McCauly, et al.*—Memo Decision filed May 1, 1941).

On June 22, 1939, District Judge J. Stanley Webster of the United States District Court for the Eastern District of Washington handed down an oral opinion, which was not officially reported, sustaining the right of the State, under the exercise of its sovereign police power, to reasonably regulate the taking of fish in the waters within its jurisdiction. (*United States of America in Behalf of Its Ward, Sampson Tulee* v. *C. R. House, Sheriff of Klickitat County, Washington.*) This decision is contrary to the holding of District Judge Bowen in the *Makah* case referred to above and is in full consonance with the rulings of the Supreme Court of the State of Washington.

We respectfully submit that a substantial Federal question is presented on this appeal and we concur with appellant that if for any reason the Supreme Court of the United States should conclude that it lacks jurisdiction to review the final judgment of the Supreme Court of the State of

Washington by appeal, the court should consent to undertake such a review as if on *certiorari* in accordance with Section 237 (c) of the Judicial Code (U. S. C. 344(c)).

Dated July 2, 1941.

Respectfully submitted,

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Counsel for Appellee.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1941

No. 318

SAMPSON TULEE, *Appellant,*

vs.

STATE OF WASHINGTON, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEE'S BRIEF

QUESTION PRESENTED

Appellant's assignments of error, reduced to their essence, present a single, sharply defined issue.

Paragraph II of Article III of the Yakima Treaty of June 9, 1855, provides in part:

"The exclusive right of taking in all the streams, where running through or bordering said reservation, is

further secured to said confederated tribes and bands of Indians, *as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory*, and of erecting temporary buildings for curing them * * *". (Italics ours.)

Appellant contends that this provision of the treaty vested in the appellant, as a member of the Yakima Tribe, a perpetual right of fishing at usual and accustomed places off the Yakima reservation, without interference in any manner whatsoever by the State of Washington, and that the regulatory statute of the State of Washington in question herein is invalid because it is repugnant to the treaty.

Appellee contends that the "off the reservation" right to fish, granted by the treaty, is subject to the paramount and superior right of the state, under the exercise of its sovereign police powers, to regulate the taking of fish from the waters within its jurisdiction for the benefit of all its citizens.

SUMMARY OF ARGUMENT

I.

A state's police power is one of the highest attributes of sovereignty, and that power has never been delegated by the several states to the Federal government.

II.

The police power can neither be abdicated nor bargained away, and is inalienable even by express grant.

III.

Upon admission into the Union, a state becomes possessed of all the rights and powers coequal with her sister jurisdictions.

IV.

The treaty making power was never intended to abridge the right of a state to regulate its strictly internal affairs. The Stevens Treaty of 1855 did not curtail or abridge the police power of the future State of Washington, and upon its admission into the Union, the state became endowed with full police powers.

V.

The protection of fish and the regulation of fishing is for the common benefit of the people, and legislation directed to that end is a valid and proper exercise of the police power. Over fish found within its water, and over wild game, the state has supreme control.

VI.

Section 5703, Rem. Rev. Stat., of the State of Washington, is a regulatory fisheries measure, and is a lawful

exercise of the state's police power. It has for its purpose the necessary preservation of the state's commercial fisheries, and meets all the requirements that the lawful exercise of police power must be reasonable, nondiscriminatory, and nonarbitrary.

VII.

The fishing places in question are outside the boundaries of the Yakima Reservation and within the sole jurisdiction of the State of Washington.

VIII.

The Yakima Indian Treaty secured to the members of the federated Yakima Tribe a vested easement right of ingress to and egress from their "usual and accustomed places of fishing" outside the reservation, there to fish "in common with the citizens of the territory" subject to any valid exercise of the right by the sovereign which is operative on all alike for the best interests of the state's aquatic resources.

IX.

Indian treaties are to be given a liberal construction, but must be considered in the light of current economic conditions prevailing in the development and conservation of our natural resources, having in mind the welfare of all the people.

X.

The Indian, by Act of Congress in 1924, has been made a citizen of the United States and of the state in which he resides. As such, he is entitled to all the rights, privileges and immunities accorded other citizens of the state, and to the equal protection of its laws, and is also subject to its laws.

XI.

Conservation of our fast diminishing natural resources is one of the chief concerns of organized government today. In the discharge of this important responsibility for and on behalf of its people, the State of Washington is acting as much in the interest of the Indian citizen as any other, and its obligation toward him is just as great, for the Indian is now an integral part of its citizenry.

I.

A STATE'S POLICE POWER IS ONE OF THE HIGHEST ATTRIBUTES OF SOVEREIGNTY AND THAT POWER HAS NEVER BEEN DELEGATED BY THE SEVERAL STATES TO THE FEDERAL GOVERNMENT.

Under our form of government, the powers of the Federal government are limited to those granted to it, either expressly or by implication, in the United States Constitution. All other powers are reserved to the State governments. This fundamental principle, with respect to the police power of the state, is cogently enunciated by the supreme court in the case of *Prigg v. Pennsylvania*, 41 U. S. (16 Pet.) 539, 10 L. Ed. 1060. We quote from page 625:

"To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be misunderstood, in any manner whatsoever, to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within territorial limits of the States, and has never been conceded to the United States."

II.

THE POLICE POWER CAN NEITHER BE ABDICATED NOR BARGAINED AWAY AND IS INALIENABLE EVEN BY EXPRESS GRANT.

From *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, at page 558:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; *that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.*" (Italics ours.)

To the same effect: *Chicago & A. R. R. Co. v. Tranbarger*, 238 U. S. 67, 35 Sup. Ct. Rep. 678; *Butchers' Union S. H. & L. Co. v. Crescent City L. S. L. & S. H. Co.*, 111 U. S. 746, 4 Sup. Ct. Rep. 652; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. Rep. 437; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383; *Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. Rep. 321; *Chicago, H. & St. P. R. Co. v. Minneapolis*, 232 U. S. 430, 34 Sup. Ct. Rep. 400; *Phillips Petroleum Co. v. Jenkins*, 297 U. S. 629, 56 Sup. Ct. 611.

III.

UPON ADMISSION INTO THE UNION, A STATE BECOMES POSSESSED OF ALL THE RIGHTS AND POWERS COEQUAL WITH HER SISTER JURISDICTIONS.

Under the decisions of the Supreme Court of the United States, Congress was without power to admit the State of Washington into the Union shorn of the right to protect its wild game and fish upon land and waters, otherwise subject to its jurisdiction.

The power of Congress to impose binding limitations upon the sovereignty of new states is not an unlimited power. The existence of a new state as an independent sovereignty imports certain inherent powers which cannot be restricted either by express provision in the Enabling Act or by prior treaties. If such treaties exist at the time the new state is admitted, then the admission repeals the treaty to that extent.

The pronouncements of our supreme court provide a basis for the rule which may be succinctly stated as this: Congress can only impose those limitations upon the sovereignty of a new state which it might impose after admission under the powers granted to it by the Federal Constitution, and that any other attempted limitation cannot be enforced. While there are numerous decisions sustaining this principle, no case furnishes a clearer enunciation of the rule than that of *Coyle v. Smith*, 211 U. S. 559, 55 L. Ed. 853 (which was reaffirmed by this court in the very recent case of *Skiriotes v. State of Florida*, 313 U. S. 69, 61 Sup. Ct. 924). The Oklahoma Enabling Act provided that the state capitol should not be changed from the City of Guthrie until 1913. In 1910 the legislature passed an act providing for a change in contravention of this provision, and the question of the binding effect of the Enabling Act came before the court. The court concluded that this attempted limitation was not binding upon the state, saying at page 565:

"The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question, then,

comes to this: Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission?"

After stating the contentions of counsel, the court referred to that provision of the constitution which authorizes Congress to admit "new states into this Union" and said (p. 567):

"'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the constitution itself. *To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the constitution, but only such as had not been further bargained away as conditions of admission.*" (Italics ours.)

The final conclusion of the court is then summarized upon page 573 of the opinion, where the court said:

"The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, *which would not be valid and effectual if the subject of congressional legislation after admission.*" (Italics ours.)

Among the authorities cited in support of this statement is the case of *Ward v. Race Horse*, 163 U. S. 504, *supra*, clearly indicating that the court intended the rule to be applicable to limitations imposed by prior treaties as well as those inserted in enabling acts. And again, upon page 576 of the opinion, the court referred to the *Race Horse* case in the following language:

"In Ward v. Race Horse, 163 U. S. 504, 41 L. Ed. 244, 16 Sup. Ct. Rep. 1076, the necessary equality of the new state with the original states is asserted and maintained against the claim that the police power of the state of Wyoming over its wild game had been restricted by an Indian treaty made prior to the admission of the state of Wyoming." (Italics ours.)

We regard this statement as absolutely decisive on the point that the State of Washington acquired supreme control over its wild life when statehood was declared. In substance it holds that it is not competent for Congress to impose upon a sovereign state limitations upon its police power with respect to its wild game upon lands not included in an Indian reservation, by treaties with the Indian tribes; and that however valid those treaties might have been in their inception, they are of necessity repealed to that extent by the admission of the state.

This principle is affirmed in many cases by the supreme court:

Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565;
Permoli v. First Municipality of New Orleans, 3 How. 589, 11 L. Ed. 739;
Strader v. Graham, 10 How. 82, 13 L. Ed. 337;
Escanaba & L. M. Transp. Co. v. City of Chicago, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442;
Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487;

Bridge Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629;

Bolln v. State, 176 U. S. 83, 20 Sup. Ct. 287; 44 L. Ed. 382;

Cardwell v. American Bridge Co., 113 U. S. 205, 28 L. Ed. 959, 5 Sup. Ct. Rep. 423.

IV.

The Treaty Making Power was Never Intended to Abridge the Right of a State to Regulate its Strictly Internal Affairs: The Stevens Treaty of 1855 Did Not Curtail or Abridge the Police Power of the Future State of Washington, and Upon its Admission Into the Union, the State Became Endowed with Complete Police Powers.

In construing the provisions of a treaty, the supreme court has upheld the police power of the states wherever possible.

In the case of *DeGeofroy v. Riggs*, 133 U. S. 258, 33 L. Ed. 642, 10 Sup. Ct. 295, the court held that the treaty making power was never intended to abridge the right of a state to regulate its strictly internal affairs. We quote from page 267:

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the acts of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."

To the same effect:

Ward v. Race Horse, 163 U. S. 504, 41 L. Ed. 244, 16 Sup. Ct. 1076;

Compagnie Francaise de Navigation A Vapeur v. State Bd. of Health, 186 U. S. 380, 394, 395, 46 L. Ed. 1209, 1216, 1217, 22 Sup. Ct. 811;
Patsone v. Pennsylvania, 232 U. S. 138, 58 L. Ed. 539, 34 Sup. Ct. 281.

The *Patsone* case involved the constitutionality of a wild game statute enacted by the Pennsylvania legislature making it unlawful for any unnaturalized foreign-born resident to kill wild birds or animals, and the validity of such statute as applied to an Italian citizen in view of a treaty with Italy consummated in 1871 guaranteeing equal protection and security for persons and property. The court held that the statute in question was not unconstitutional under the due process and equal protection provisions of the Fourteenth Amendment and did not prevent the state from exercising its power for preservation of wild life for its own citizens. We quote from the opinion delivered by Mr. Justice Holmes, page 146:

"It is to be remembered that the subject of this whole discussion is wild game, which the State may preserve for its own citizens if it pleases. *Geer v. Connecticut*, 161 U. S. 519, 529. We see nothing in the treaty that purports or attempts to cut off the exercise of their powers over the matter by the States to the full extent."

Section 8 of the Enabling Act (Rem. Rev. Statutes I) under which Washington was admitted as a state, provides in part:

"And if the constitutions and governments of said proposed states are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed states which have adopted constitutions and formed state governments as herein provided shall be deemed admitted by Congress into the Union, under and by virtue

of this act, *on an equal footing with the original states, from and after the date of said proclamation.*" (Italics ours.)

It should be borne in mind that a treaty is not a contract. While it is the supreme law of the land, it may be repealed by Congress either expressly or by necessary implication. Neither does a separate rule obtain with respect to Indian treaties. As was said in the case of *Cherokee Tobacco v. United States*, 11 Wall. 616, 20 L. Ed. 227, at p. 621 of 11 Wall:

"A treaty may supersede a prior act of Congress * * *, and an act of Congress may supersede a prior treaty. * * *. In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian Nations, within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered."

To this may be added the general rule of construction discussed under the previous heading that the admission of a state into the Union imparts an equality of power over internal affairs on an equal footing with the other states. And in *Escanaba Company v. Chicago*, 107 U. S. 678, the court speaking through Mr. Justice Fields said, at page 683:

"But the states have full power to regulate within their limits, matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people."

And further at page 688:

"Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. * * * Equality of constitutional right and power is the condition of all the States of the Union, old and new."

Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the states.

The leading case upon this, both because of its statement of the general rule and also because of its remarkable similarity to the case at bar, is the case of *Ward v. Race Horse*, 163 U. S. 504, 41 L. Ed. 244. In that case it appeared that the Treaty of 1869 between the Bannock Indians and the United States contained the following provision:

"But they shall have the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

At the time of the passage of that treaty there was in existence an act of Congress creating the territory of

Wyoming, which provided that nothing in the act should impair the treaty rights of the Indians as they then existed. In 1890, however, Wyoming was admitted into the Union under an enabling act, section 1 of which act provided:

"That the state of Wyoming is hereby declared to be a state of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original states in all respects whatever; and that the constitution which the people of Wyoming have formed for themselves be, and the same is hereby accepted, ratified, and confirmed."

In 1895 an act was passed by the legislature of Wyoming regulating the killing of wild game, and in the same year the petitioner, Race Horse, a member of the Bannock tribe, was arrested and charged with killing elk upon unoccupied land of the United States in violation of this statute. The case went by *habeas corpus* to the Supreme Court of the United States, which court held that the admission of Wyoming upon an equal footing with the original states operated *pro tanto* to repeal the treaty in so far as it might be construed to restrict the power of the sovereign state to regulate the taking of wild game. In the course of its opinion the court said (p. 511):

"The act which admitted Wyoming into the Union, as we have said, expressly declared that that state should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians. *These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority.* But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule." (Italics ours.)

And reviewing many authorities in respect to this general rule, the court continued (p. 514):

"The power of all the States to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the State of Wyoming, that State would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the State. Wyoming, then will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence. Nor need we stop to consider the argument advanced at bar, that as the United States, under the authority delegated to it by the Constitution in relation to Indian tribes, has a right to deal with that subject, therefore it has the power to exempt from the operation of state game laws each particular piece of land, owned by it in private ownership within a State, for nothing in this case shows that this power has been exerted by Congress. The enabling act declares that the State of Wyoming is admitted on equal terms with the other States, and this declaration, which is simply an expression of the general rule, which presupposes that States, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the States already admitted, repels any presumption that in this particular case Congress intended to admit the State of Wyoming with diminished governmental authority. The silence of the act admitting Wyoming into the Union, as to the reservation of rights in favor of the Indians, is given increased significance by the fact that Congress in creating the Territory expressly reserved such rights. Nor would this case be affected by conceding that Congress, during the existence of the Territory, had full authority in the exercise of its treaty making power to charge the Territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a Territory it would be also within the power of Congress to continue them in the State, on its admission into the Union. Here the enabling act not

only contains no expression of the intention of Congress to continue the burdens in question in the State, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission."

We shall briefly compare the facts in that case with those in the case at bar. First, as to the territorial act, in the *Race Horse* case the territorial act provided that the organization of such territory should not be deemed destructive of any treaty rights of the Indians. The act of Congress of March 2, 1853 (10 Stat. at Large, page 172), which organized the territory of Washington, contains a similar provision with respect to Indian treaties. Second, as to the treaties, in the *Race Horse* case the provision of the treaty was that the Indians should have the right to hunt upon all unoccupied lands of the United States as long as peace subsisted. In the present case the treaty under consideration gives the Indians the right to hunt upon all open and unclaimed lands (a provision identical with the Bannock treaty), and in addition the right to fish at all usual and accustomed places. Third, as to the Enabling Act, the Wyoming Enabling Act admitted Wyoming into the Union "on an equal footing with the original states in all respects whatever." The Washington Enabling Act provides that the states named therein "shall be deemed admitted by Congress into the Union, under and by virtue of this act, on an equal footing with the original states." The phraseology is somewhat different but the effect is the same.

It will thus be seen that in their material facts there is no difference between the *Race Horse* case and the case at bar.

Neither is there anything inconsistent with that decision in the subsequent case of *United States v. Winans*, 198 U. S. 371, 49 L. Ed. 1089. The question of the power of the state was not there involved. That was merely a controversy between the Indians and a riparian owner who sought to exclude the Indians from taking advantage of a servitude imposed upon the land by the United States, which was the original proprietor and owner of the land. Indeed, the *Race Horse* case is nowhere mentioned in that decision.

V.

THE PROTECTION OF FISH AND THE REGULATION OF FISHING IS FOR THE COMMON BENEFIT OF THE PEOPLE, AND LEGISLATION DIRECTED TO THAT END IS A VALID AND PROPER EXERCISE OF THE POLICE POWER. OVER FISH FOUND WITHIN ITS WATERS, AND OF WILD GAME, THE STATE HAS SUPREME CONTROL.

The decisions of the courts in this country, from the supreme court down, are in unison in holding that the wild life, including animals, fish and fowl, is under the control of the state which holds the title thereto in trust for all the people, and in the regulation of and restrictions upon the taking of game and fish within the jurisdiction of a state, the sovereign is but dealing with its own property over which its control is absolute.

The supreme court of the United States, in the early case of *Geer v. Conn.*, 161 U. S. 519, 16 Sup. Ct. 600, very succinctly and clearly enunciated the nature of this trust and ownership by the state as follows:

" 'Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to

the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the state, as held by this court in *Martin v. Waddell*, 16 Pet. (367) 410 (10 L. Ed. 997), represents its people, and the ownership is that of the people in their united sovereignty'."

This principle has never been departed from, but on the contrary, has been the basis for permitting the States to exercise the widest latitude of discretion in determining what measures are necessary and expedient to protect these valuable natural resources.

The United States Supreme Court early declared that each State has the right and power of a proprietor and sovereign to control, regulate, restrict, and license the enjoyment by individuals of the privilege of taking fish from its public waters.

McCready v. Virginia, 94 U. S. 391, 397;
Manchester v. Massachusetts, 139 U. S. 240, 266, 11 Sup. Ct. 559.

Numerous holdings might be cited, but we refer to the latest pronouncement of the supreme court in *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422 (decided March 2, 1936).

The suit was brought to enjoin the State of California from enforcing certain provisions of the State Fish and Game Code, alleged to contravene the commerce clause and the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution.

The facts are summarized in the opinion delivered by Mr. Justice Sutherland, as follows, quoting from page 423:

"Appellant is a California corporation engaged in the business of manufacturing, from the meat of sardines, fish flour for human consumption. The sardines are caught by fishermen upon the high seas beyond the three-mile limit to which the jurisdiction of the state extends, sold to appellant, and brought into the state and there reduced to fish flour at appellant's reduction plants. The fish flour is made with the expectation of selling and shipping it in interstate and foreign commerce; and it is so sold and shipped and is used as food in the United States and foreign countries. Sardines are a migratory fish found in great numbers in the Pacific Ocean beyond the three-mile limit as well as within that limit. So far as known, they spawn upon the open seas. In the process of reducing the fish, appellant uses a portion for producing flour for human consumption, the remainder being converted into a meal used for chicken feed, and into fertilizer, fish oil and other nonedible substances.

"Sardines caught in the same way are also purchased by packers, who clean, cook, and can or preserve them for human food, using in that process only a part of the fish and utilizing the remainder for reduction into non-edible products.

"The provisions of the Fish and Game Code which appellees threaten to enforce against appellant and those necessary to be considered in that connection are copied in the margin. The bill alleges that appellees will prevent appellant from manufacturing fish flour in its reduction plants while at the same time permitting packers to use sardines, taken from the waters of the state or those outside, in their packing plants."

This case reaffirms several rules relative to a state's police power over its wild game and fish to which our Supreme Court is unqualifiedly committed.

(a) *That a state has supreme control over its wild life and* (b) *may conserve its aquatic resources as it*

deems expedient, although interstate commerce may be remotely affected.

Quoting from page 425:

"There is nothing in the state act to suggest a purpose to interfere with interstate commerce. It in no way limits or regulates or attempts to limit or regulate the movement of the sardines from outside into the state, or the movement of the manufactured product from the state to the outside. The act regulates only the manufacture within the state. Its direct operation, intended and actual, is wholly local. Whether the product is consumed within the borders of the state or shipped outside in interstate or foreign commerce are matters with which the act is not concerned. *The plain purpose of the measure simply is to conserve for food the fish found within the waters of the state. Over these fish, and over state wild game generally, the state has supreme control.* Sardines taken from waters within the jurisdiction of the state and those taken from without are, of course, indistinguishable; and to the extent that the act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. *Silz v. Hesterberg*, 211 U. S. 31, 39-40.

"If the enforcement of the act affects interstate or foreign commerce, that result is purely incidental, indirect, and beyond the purposes of the legislation. The provisions of the act assailed are well within the police power of the state, as frequently decided by this and other courts. It is unnecessary to do more than refer to *Silz v. Hesterberg, supra*, pp. 39 *et seq.*, and *Van Camp Sea Food Co. v. Department of Natural Resources*, 30 F. (2d) 111, where the decisions are collected." (Italics ours.)

(c) *State regulations bearing a reasonable relation to an object within the state police power—e. g. the conservation of the State's fish supply—cannot be declared invalid because a court may regard them as ineffectual,*

or harsh in particular instances or as aids to an objectionable policy.

Quoting from page 427:

"These provisions have a reasonable relation to the object of their enactment—namely, the conservation of the fish supply of the state—and we cannot invalidate them because we might think, as appellant in effect urges, that they will fail or have failed of their purpose. *McLean v. Arkansas*, 211 U. S. 539, 547-548. Nor can we declare the provisions void because it might seem to us that they enforce an objectionable policy or inflict hardship in particular instances. *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 77. And see, generally, *Chicago, B & Q. R. Co. v. McGuire*, 219 U. S. 549. 'Whether the enactment is wise or unwise,' this court said in that case (p. 569), 'whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance'."

VI.

SECTION 5703, REMINGTON'S REVISED STATUTES OF WASHINGTON, IS A REGULATORY FISHERIES MEASURE AND IS A LAWFUL EXERCISE OF THE STATE'S POLICE POWER. IT HAS FOR ITS PURPOSE THE NECESSARY PRESERVATION OF THE STATE'S COMMERCIAL FISHERIES AND MEETS ALL THE REQUIREMENTS THAT THE LAWFUL EXERCISE OF POLICE POWER MUST BE REASONABLE, NONDISCRIMINATORY AND NONARBITRARY.

The statute in question is nondiscriminatory and uniformly operates on all citizens alike. It is not a measure designed to regulate Indian fishing, but on the contrary is a conservation measure, having for its purpose the protection and perpetuation of the commercial fishing industry in the State of Washington.

The test for determining whether or not the legislative enactment is a proper exercise of the police power is plain, simple, and sound, and is announced in *Lawton v. Steele*, 152 U. S. 133, which has been frequently cited with approval. The Supreme Court held that laws prohibiting the use of certain types of gear in state waters was a valid exercise of state police power to preserve from extinction fish in waters within its jurisdiction. We quote from page 140 of the opinion:

"An act of the legislature which has for its object the preservation of the public interests against the illegal depredations of private individuals ought to be sustained, *unless it is plainly violative of the Constitution or subversive of private rights.*" (Italics ours.)

And again in the same case at page 137, it was stated that:

"It must appear first, that the interests of the public generally, as distinguished from those in a particular class, require the interference; and, second, that the means are reasonably necessary for the accompaniment of the purpose and not unduly oppressive upon individuals."

The state's power to regulate its fisheries, and the extent thereof, is well summarized in 22 *Am. Juris.*, paragraph 34, page 691, as follows:

"The state has the power to regulate fisheries in public and private streams, and to adopt such appropriate means as may seem best to it for the preservation of edible fish for the benefit of the people; subject only to constitutional provisions against discrimination, and to any valid exercise of authority under the provisions of the Federal Constitution. The right of the state to regulate fisheries for the preservation of fish applies not only to edible fish but also to those valuable for any purpose. This right to regulate fish and fisheries may be based either on the police power of the state to enact laws designed to increase the industries of the state, to develop

its resources, and to add to its wealth, or on the circumstance that the fish in the waters of the state, as well as the game in its forests, belong to the people in their sovereign capacity, and are not the subject of private ownership, except in so far as the people may elect that they shall be. It is not only the right of the state, but also its duty, to preserve for the benefit of the general public the fish in its waters, in their migrations and in their breeding places, from destruction or undue reduction in numbers through the caprice, improvidence, or greed of the riparian proprietors, as well as of trespassers. The state may prohibit the catching of fish within its waters; if it allows the catching, it may regulate it by the imposition of such conditions, restrictions, and limitations as it deems needful or proper. The state may prohibit the taking of fish by methods other than those prescribed by law, may prescribe the size of fish taken, may prohibit the pollution of waters within its limits, and may also either prescribe limitations as to the disposition of fish once they have been taken or forbid their sale."

In *11 R. C. L.*, paragraph 34, page 1046, we find this statement:

"By reason of the fact that title to fish and game within the boundaries of a state is vested in the people of the state in their sovereign capacity, the legislature has greater power over such property than it has over almost any other commodity, and in order to preserve such property to the people of the state, the law making assembly may enact that only citizens of the state shall take fish from the waters within its jurisdiction."

Under the state's police powers to regulate its fisheries, the courts have held that it is within its powers to protect its waters from pollution (*People v. Truckee Lbr. Co.*, 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581); to declare as public nuisances any obstruction of its streams or gear used in illegal fishing (*State v. Mavrikas*, 148 Wash. 651); to compel adequate fishways for free migration of fish (*Inland Fisheries v. Holyoke Water Power Co.*,

104 Mass. 446, 6 Am. Rep. 247, aff'd 15 Wall (82 U. S.) 500, 21 L. Ed. 133); to regulate the time of taking (*State v. McGuire*, 24 Ore. 366, 33 Pac. 666, 21 L. R. A. 478); the manner of taking (*Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 U. S. (L. Ed.) 385); the possession of (*State v. Schuman*, 36 Ore. 16, 58 Pac. 661, 47 L. R. A. 153); the disposition of (*Commonwealth v. Gilbert*, 160 Mass. 157, 35 N. E. 454, 22 L. R. A. 439); and the use of (*Van Camp Sea Food Co. v. Department of Natural Resources*, 30 Fed. (2d) N1); provide for the forfeiture of gear used in illegal fishing (*Lawton v. Steele, supra*) and make it a criminal offense to take fish in violation of its regulations (*Lawton v. Steele, supra*).

Reasonable regulation also includes the licensing of sports and commercial fishermen. A state may refuse to license citizens of other states (*State v. Kofines*, 33 R. I. 211, 80 Atl. 432, Anno. Cas. 1913C 1120; *Wharton v. Wise*, 153 U. S. 155, 14 S. Ct. 783, 38 U. S. (L. Ed.) 669.)

The state may lawfully graduate the license fee schedule according to the types of fishing in which the licensees engage (*State v. Hanlon*, 77 Oh. St. 19, 82 N. E. 662, 13 L. R. A. (N. S.) 539).

Appellant may contend the license fee is a revenue measure under the guise of police powers.

The decisions of this court, and of the Supreme Court, negative such contention.

The licensing of fishing privileges has been sanctioned as a valid exercise of police power in the regulation and protection of this valuable aquatic resource. (*State v. Snowman*, 50 L. R. A. 545; *Lacoste v. Department of Conservation*, 263 U. S. 545; *Anderson v. Smith* (C. C. A.

Ninth Circuit) 71 F. (2d) 493; *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422).

In the *Lacoste* case the Supreme Court decreed that it was within the valid exercise of the state's police power to require payment of a tax upon the skins or hides of wild animals as a condition precedent to transferring its title to the dealer paying the tax.

We quote from page 550:

"Our examination of this act discloses no reason why the decision of the state court should be disturbed. The legislation is a valid exertion of the police power of the State to conserve and protect wild life for the common benefit. It is within the power of the State to impose the exaction as a condition precedent to the divestiture of its title and to the acquisition of private ownership."

In the *Anderson* case the Circuit Court of Appeals for the Ninth Circuit, speaking through Circuit Judge Wilbur, upheld the right of the Territory of Alaska to fix license fees for fishing in waters of Alaska, and in so doing may discriminate between residents and non-residents, provided that license exacted of the citizens of the United States nonresident in Alaska is not so exorbitant as practically to prohibit or so unreasonable as to interfere with rights of fishing granted by Congress.

In the *Bayside Fish Flour Co.* case the United States Supreme Court sustained the right of the State of California to exact a license for each plant or place of business engaged in the preservation of fish and the manufacture of fish scrap products.

The distinction between a tax for revenue purposes and the license fee exacted under lawful police regulations is clearly set forth in 37 C. J., p. 169, as follows:

"If the fee is exacted for the primary purpose of regulating or restraining an occupation or privilege deemed dangerous to the public or to be specially in need of public control, and compliance with certain conditions is required in addition to the payment of the prescribed sums, such fee is a license fee or license tax properly imposed in the exercise of the police power and is not strictly speaking an ordinary tax, especially where the fee does not exceed and is intended to cover the actual expense of issuing the license and inspecting and controlling the occupation; nor does it lose its character as a license fee because it is called a tax in the legislation which imposed it."

It cannot be challenged that the license fees under scrutiny in the case at bar are for the purpose of properly policing the state's fishing industry and devoted to activities designed to rehabilitate the supply.

VII.

Fishing Places in Question Are Outside the Boundaries of the Yakima Indian Reservation and Within the Sole Jurisdiction of the State.

Under the explicit terms of the treaty, the fishing grounds in question are within the jurisdiction of the State of Washington.

The sole issue then is resolved into whether or not the state is circumscribed in its police powers by the reservations in the treaty of "also the right of taking fish of all usual and accustomed places in common with the citizens of the territory."

Appellee contends his position is conclusively determined in *United States v. Winans*, 198 U. S. 371, 25 Sup. Ct. 662, and *Kennedy v. Becker*, 241 U. S. 556, Sup. Ct. 705. Also to the same effect is *Lawton v. Steele*, 152

U. S. 133, wherein we find this pertinent language at page 139:

"As the waters referred to in the act are unquestionably within the jurisdiction of the State of New York, there can be no valid objection to a law regulating the manner in which fishing in these waters shall be carried on. *Hooker v. Cummings*, 20 Johns. 91. The duty of preserving the fisheries of a State from extinction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish, is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food."

We will make only a brief reference to the decisions of the Supreme Court of the State of Washington bearing on this point.

The question of Indian fishing rights arising under the Stevens Treaty of 1855 was first tested in the Washington Territorial Court in the case of *U. S. v. Taylor*, 3 Wash. Terr. 88, decided January 25, 1887. The United States brought suit to restrain one Frank Taylor from maintaining a fence around a large body of land abutting on the Tum Water Fisheries on the Columbia River which obstructed the land approach to the fishery. The defendant had obtained a patent in fee simple from the United States to the lands and claimed a right to enclose his property for the protection of his growing crops. An injunction was granted by the district court and reversed by the supreme court of the territory on the grounds that the treaty imposed a servitude on the land which could not be extinguished by the vesting of a fee simple title. The police power of the future state was not considered. The court confined its decision to granting the

Indian his primitive rights to fish by ancient methods for food for himself and family.

The clause in the Yakima Treaty now under consideration next came before the Supreme Court of the State of Washington to determine the meaning of the phrase "in common with the citizens of the territory," in the case of *State of Washington v. Towessnute*, 89 Wash. 478, decided Feb. 4, 1916. Towessnute, contrary to state law, was fishing without a license, snagging salmon with a gaff hook, and catching fish without hook and line on the Yakima River. The case held that the Indian had exclusive fishing rights on the reservation and nothing but equality with the white man outside the reservation. That the main purpose of the government was to separate the Indian from the white man and care for the Indian in a district more confined. Yet, it was natural to indulge him with hunting and fishing at his old hunting and fishing grounds; that the white man might not by crafty statute cut off the Indian's privilege at these places outside the reservation. The court reviewed *Ward v. Race Horse*, 163 U. S. 504, involving the principle that Congress by act of admitting Wyoming as a state revoked whatever in the treaty might have impaired the future police power of the state. The court also reviewed *U. S. v. Winans*, 198 U. S. 371, holding that land grants would not impair Indian easements on ancient fishing spots, that the easement privilege might not be put above police power. "Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised."

The Supreme Court of the State of Washington handed down on the same day the case of *State of Washington v. Alexis*, 89 Wash. 492, which is identical in all respects with the *Towessnute* case, except it involved the fishing rights of the Lummi Indians and the Muckelteeoh Treaty proclaimed in 1859, the language of the treaty being exactly the same as the Yakima Treaty. The court held the case was on all fours with the *Towessnute* case and on petition for rehearing, decided March 17, 1916, held that Congress in making provisions by an Indian treaty could not do so at the expense of the police power of the future state, notwithstanding the fact that the Indians were more or less dependent upon the fish for subsistence. The case was different from the *Towessnute* case in that the testimony showed the Lummi Indians gained a livelihood by trafficking in fish. The court said:

"Under Federal decisions, as we understand them, Congress, in making provisions for the Indians, could not do so at the expense of the police power of the future state. The Lummi case strikingly shows to what ravages the salmon industry of Washington is exposed by these Indian treaties, as they are sought to be interpreted."

The rights of the Yakima Indians were next adjudicated by the highest court of Washington in the case of *State of Washington, respondent v. George Meninock*, 115 Wash. 528, decided in April, 1921. Defendants were Yakima Indians maintaining their tribal relations and living on the Yakima reservation. They were adjudged guilty of illegal fishing 400 feet below the Prosser Dam in the Yakima River. The court affirmed the *Towessnute* case, finding that the pronouncements of our supreme court were fortified and in perfect consonance with the

conclusion reached by the Supreme Court of the United States in *Kennedy v. Becker*, 241 U. S. 556, which was decided in 1916.

In the case of *State of Washington v. Jim Wallahee*, 143 Wash. 117, the identical article of the treaty now under scrutiny was considered by the court in connection with the state's right to punish the Yakima Indian for violation of state game laws. While this case did not involve fishing rights, the principle enunciated in *Ward v. Race Horse*, 163 U. S. 504, were quoted with approval as authority for the proposition that all the sovereign powers inherent to a state passed to the State of Washington when admitted to statehood and held the Yakima Indian outside the boundaries of the reservation had no greater immunity to state game and fish laws than any citizen of the state.

We further invite the court's attention to decisions from other states involving Indian fishing off the reservation.

State v. Morrin, 117 N. W. 1006 (1908), the Wisconsin Supreme Court held the treaties of 1843 and 1854 between the United States and the Chippewa Indians, preserving to such Indians the right to hunt and fish on the territory ceded by them to the United States, were abrogated so far as such territory was included within the State of Wisconsin by the admission of the state into the Union under *Ward v. Race Horse*, decided in 1895. The defendant was a Chippewa and was convicted of the violation of state laws by using gill nets to fish in the waters of Lake Superior. The court also predicated its decision on the fact an Indian was made a citizen under act of Congress, 1887:

"His status is like that of every other citizen, and subjects him to penalties for the violation of any state law."

State v. Johnson, 249 N. W. 284, decided by the Supreme Court of Wisconsin in 1923. A Chippewa Indian, while hunting for deer out of season mistook a white man for a deer and shot him. The locus of the crime was on the Indian reservation. The defendant was a tribal Indian, holding land on the reservation, held in trust by the government. The questions involved were: 1. Had the state court jurisdiction to try and determine the prosecution of an Indian for a crime committed on patented land? 2. Had the state jurisdiction to try an Indian for the crime of hunting out of season within the exterior boundaries of a reservation? Both answered in the affirmative.

People v. Chosa, 252 Mich. 154, 233 N. W. 205, decided by the Supreme Court of Michigan in 1930, involved the right of Indians under treaty to hunt and fish in violation of general game laws of the state, on lands ceded by their tribe to the United States.

The Federal courts in this district have interpreted Indian fishing rights under the Stevens Treaty in the following cases:

The James G. Swan, 50 Fed. 108;
United States v. Alaska Packers, 79 Fed. 152;
Seufert v. Olney, 193 Fed. 200;
United States v. Winans, 73 Fed. 72;
United States v. Taylor, 44 Fed. 2;
United States v. Seufert Bros. Co., 78 Fed. 520.

VIII.

The Yakima Indian Treaty Secured to the Members of the Federated Yakima Tribe a Vested Easement Right of Ingress to and Egress from Their "Usual and Accustomed Places of Fishing" Outside the Reservation, There to Fish "In Common With the Citizens of the Territory" Subject to Any Valid Exercise of the Right Which is Operative on All Alike for the Best Interests of the State's Aquatic Resources.

Under this heading we propose to incorporate our reply to appellant's contentions and set forth the state's position on the construction which must be given to the particular words in the treaty under examination.

Appellant contends that the language in the treaty *"and also the right of taking fish at all usual and accustomed places in common with the citizens of the territory,"* secured to the Yakima Tribe not only an easement right of occupancy, but also a property right in the fish, which are protected under the Fourteenth Amendment to the Constitution of the United States, without interference in the exercise of this right in any manner, by regulation or otherwise, by the State of Washington.

It is the State's contention that the treaty imposed a perpetual easement on the ancient fishing sites, there to fish in common with the citizens of the territory, subject to the paramount and superior right of the state under the exercise of its sovereign police powers to regulate the taking of fish from the waters within its jurisdiction.

While we do not accede to the proposition advanced by appellant that, the treaty secured to the Indians a perpetual property right in the fisheries, the protection

of alleged vested property rights sought to be invoked under the Fourteenth Amendment in derogation of the State's police power, is answered in the case of *Thomson v. Dana*, 52 Fed. (2d) 759, 762 (District Court D, Oregon):

"Therefore it must be concluded that the protection of property rights, and the equal protection of the laws, vouchsafed by the Fourteenth Amendment, depend entirely upon the same principles, when applied to regulation of the fisheries of a state. See *Patsone v. Pennsylvania*, 232 U. S. 138, 143, 34 S. Ct. 281, 58 L. Ed. 539. Conservation of fish for the common good of all citizens of a state is paramount, and reasonable regulations to attain that end do not infringe upon the property protective, the equality, nor even the commerce clauses of the Constitution of the United States."

To determine what rights the Indians secured unto themselves under the Stevens Treaty of 1855, requires an excursion into the history of Indian litigation.

The status of Indian title first came before the Supreme Court of the United States in 1810 in the case of *Fletcher v. Peck*, 6 Cranch. 87, 3 L. Ed. 162, where the court held that the State of Georgia was seized in fee of certain lands to which the Indian title had not been extinguished. In concluding that opinion, Justice Marshall said (page 141):

"The majority of the court is of the opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state."

This case was followed in 1923 by the famous case of *Johnson v. McIntosh*, 8 Wheaton 542, 5 L. Ed. 681. That case involved the question of whether or not certain Indians had a right to convey land occupied by them without the consent of the Federal government. The

court held that the fee simple title to the Indian lands was vested first in the European nations by right of discovery and then in the government by treaty and by the Revolutionary War.

We quote from page 592:

"However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. * * * However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual conditions of the two peoples, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice."

In 1831 the *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25, was decided. That case involved the question of whether or not the Cherokee Nation was a foreign state in the sense that it might sue the State of Georgia in the supreme court under that provision of the constitution which gave to the court jurisdiction over controversies between states and foreign states. Justice Marshall answered this question in the negative, saying (page 17):

"Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. *They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will* which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state

of pupilage; their relation to the United States resembles that of a ward to his guardian." (Italics ours.)

In the following year the case of *Worcester v. Georgia*, 6 Peters 515, 8 L. Ed. 483, came before the court where it was held that Congress under the constitution had the right to regulate commerce and intercourse with the Indian tribes and that this power could not be curtailed or restricted by state legislation.

In 1842 the case of *Martin v. Waddell*, 16 Peters 367, 10 L. Ed. 997, was decided by the highest court. That case involved a controversy between certain persons who claimed title to certain oyster beds in New Jersey. The plaintiffs claimed by conveyances under a charter granted to the Duke of York by Charles II of England. The defendant claimed under patent from the State of New Jersey. The court held that no fishing rights passed under the charter by reason of its peculiar provisions, and that such rights were consequently vested in the State of New Jersey. At the same time, however, the court observed that the grant to the Duke of York might have included all of the attributes of sovereignty, saying (p. 409):

"*The right of the king to make this grant, with all of its prerogatives and powers of government, cannot at this day be questioned.* But in order to enable us to determine the nature and extent of the interest which it conveyed to the duke, it is proper to inquire into the character of the right claimed by the British crown, in the country discovered by its subjects, on this continent; and the principles upon which it was parceled out and granted.

"The English possessions in America were not claimed by right of conquest, but by right of discovery. For according to the principles of international law, as then understood by the civilized powers of Europe, the

Indian tribes in the new world were regarded as mere temporary occupants of the soil, *and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered.* Whatever forbearance may have been sometimes practiced towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants." (Italics ours.)

This case, we submit, is absolutely decisive upon this proposition. The ruling in substance was, that title to the oysters in question first vested in the king by right of discovery, and then in the State of New Jersey by reason of the Revolution. The opinion clearly holds that the Indian right of occupancy does not include the title to wild game, which is vested in the nation, and to which title the states have succeeded.

In 1846 the question of the power of the Federal government to extend its criminal statutes over lands occupied by the Indians came before the court in the case of the *United States v. Rogers*, 4 Howard 566, 11 L. Ed. 1105. This power was affirmed by the court in the following language (p. 571):

"It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe, and they hold and occupy it with the assent of the United States *and under their authority.* The native tribes who were found on this continent at the time of its discovery had never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parceled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, *and the Indians continually held to be, and treated as, subject to their dominion and control.*" (Italics ours.)

The court after concluding that it was useless to inquire into the abstract justice of this right, continued:

"It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit to dispute, *that the Indian tribes residing within the territorial limits of the United States are subject to their authority*, and where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian."

Congress has always exercised complete sovereignty over the property and rights of the Indians (*Cherokee Tobacco v. United States*, 11 Wall. 616, 20 L. Ed. 226; *United States v. Cook*, 19 Wallace 591, 22 L. Ed. 210; *Beecher v. Wetherby*, 95 U. S. 517, 24 L. Ed. 440; *Butz v. Northern Pacific Railway Company*, 119 U. S. 55, 30 L. Ed. 330; *United States v. Kagama*, 118 U. S. 375, 30 L. Ed. 228; *Choctaw Nation v. United States*, 119 U. S. 1, 30 L. Ed. 306; *Cherokee Nation v. Railway Company*, 135 U. S. 641, 34 L. Ed. 295; *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. Ed. 1041; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. Ed. 183; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 47 L. Ed. 299; *Conley v. Ballinger*, 216 U. S. 84, 54 L. Ed. 393).

While the tribal organizations were recognized for the purpose of convenience in dealing with the Indians, even this form of dealing was abolished by Act of Congress of March 3, 1871 (Section 2079, Revised Statutes).

From the language in the treaty it is plain that as to streams running through and bordering on the Yakima reservation the exclusive right of taking fish in such waters is reserved to the confederated tribes.

It is the cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every section, clause, or word used (25 R. C. L. 246, p. 1004).

Clearly, from the language employed, "at their usual and accustomed places" outside the reserved area, it was intended to mean that they had certain fishing rights outside the reservation, and were not to be restricted solely thereto.

We do not ordinarily secure a restriction of an existing right. We ordinarily secure a benefit. We do not ordinarily secure a curtailment of what is already possessed.

What rights were secured? Not common fishing rights with the white man outside the reservation. If that had been the intention, appropriate words would have been employed. The words used were: "at all usual and accustomed places of fishing in common with the citizens of the territory."

The only logical construction to be given this significant language is that it impressed upon all the domain included in this large cession of land the Indians made to the government a perpetual easement to guarantee the tribe ingress to and egress from *"their usual and accustomed places of fishing,"* and this, no matter if the ceded lands were thrown open to settlers, no matter if white men obtained a fee simple patent, they always took it subject to the right of the treaty Indians to go to and from said ancient fishing grounds and enjoy fishing at their accustomed places.

That this was the intendment is made clear in the case of *United States v. Winans*, 198 U. S. 371, 49 L. Ed. 1089. In that case it appeared that the defendant, Winans, was the owner of certain lands adjoining an ancient and accustomed place of fishing of the Yakima Indians on the Columbia River. Winans erected a fish wheel at this place and refused to allow the Indians to go across his land for the purpose of fishing. The government, in behalf of the Indians, brought an action to enjoin this refusal and the court held that this provision of the treaty was intended to cover a situation of this nature. In the course of that opinion the court said (p. 381):

"The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,—the right of crossing it to the river,—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty."

There was no question there involved of the power of the state to regulate the exercise of that right, neither does it appear that the Indians there sought to exercise the right in violation of state law. Indeed, the court was careful to make it clear that the treaty did not interfere with the police power of the state, as appears from that portion of the opinion where it said (p. 384):

"*Nor does it restrain the state unreasonably, if at all, in the regulation of the right.* It only fixes in the land such easements as enable the right to be exercised." (Italics ours.)

In short, this reservation merely affords easements to make possible the enjoyment of the fishing rights, but it does not curtail the authority of the state in the exercise of its police power to regulate the right itself. That is made plain in the opinion of Mr. Justice Hughes in

State ex rel. Kennedy v. Becker, 241 U. S. 556, 36 Sup. Ct. 705.

In the *Becker* case the supreme court said it was within the competency of the State of New York in the exercise of its sovereign police power to regulate this right precisely as if the land in question had never constituted part of the original land which was ceded.

The *Becker* case involved the proper construction of a certain treaty with the New York Indians, which treaty provided for the conveyance of certain lands by the Indians and then contained the following reservation:

"Also, excepting and reserving to them, the said parties of the first part and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed."

The case was a habeas corpus proceeding brought on behalf of certain of the members of this tribe who had been arrested for taking fish in violation of the game laws of New York. The court held that this reservation was a reservation of a right to go upon the lands and exercise hunting and fishing privileges, but that it did not constitute any immunity from general police power statutes of the state regulating the taking of wild fish and game. In the course of its opinion, the court observed:

"*The controversy relates solely to the state power over these Indians* . . . . The argument for the plaintiffs in error has taken a wide range, and embraces an extended history of the dealings with the Six Nations. We do not find it to be necessary to review this interesting history, as the question to be determined is a narrow one. The *locus in quo* is within the state of New York, being within 1 mile from the point where Eighteen Mile creek empties into Lake Erie. It is not within the territorial limits of the Indian Reservation on which the Senecas reside. It is within the territory which was

ceded by the Seneca Nation to Robert Morris by the treaty of the 'Big Tree,' of Sept. 15, 1797 [7 Stat. 601] and the question turns upon the construction of this treaty; *that is, no consequences which attached to the reservation therein of fishing and hunting rights upon the lands then granted.* * * *

"The right thus reserved was not an exclusive right. Those to whom the lands were ceded, and their grantees, and all persons to whom the privilege might be given, would be entitled to hunt and fish upon these lands, as well as the Indians of this tribe. And, with respect to this non-exclusive right of the latter, it is important to observe the exact nature of the controversy. It is not disputed that these Indians reserved the stated privilege both as against their grantees and all who might become owners of the ceded lands. We assume that they retained an easement, or profit *a prendre*, to the extent defined; that is not questioned. *The right asserted in this case is against the State of New York. It is a right sought to be maintained in derogation of the sovereignty of the state. It is not a claim for the vindication of a right of private property against any injurious discrimination, for the regulations of the state apply to all persons equally.* It is the denial with respect to these Indians, and the exercise of the privilege reserved, of all state power of control or reasonable regulation as to lands and waters otherwise admittedly within the jurisdiction of the state.

" * * * *We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative, or so to divide the inherent power of preservation as to make its competent exercise impossible.* Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, *but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised.* This was clearly recognized in *United States v. Winans*, 198 U. S. 371, 384, where the court, in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians,

ratified in 1859 (12 Stat. at L. 951), said (referring to the authority of the State of Washington): *'Nor does it' (that is, the right of 'taking fish at all usual and accustomed places') 'restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised'.*" (Italics ours.)

Surely no one would seriously contend it is within the power of the Indian and beyond the power of the state to prevent the taking of fish by dynamite, or say that the white man is restricted in his methods of taking fish as a conservation measure, as a necessary precaution to prevent exhaustion of the supply, and the Indian without restraint can use explosives or other destructive methods while fishing alongside the white fisherman.

Once the right of the state to enter the field to do that much is recognized, where is the line of demarcation?

The state can surely impose reasonable regulations where designed for the preservation of the fish in its waters. If you recognize the existence of the power, then the only question to be determined is whether its exercise is arbitrary, capricious or discriminatory. (*Lawton v. Steele, supra.*)

IX.

INDIAN TREATIES ARE TO BE GIVEN A LIBERAL CONSTRUCTION, BUT MUST BE CONSIDERED IN THE LIGHT OF CURRENT ECONOMIC CONDITIONS PREVAILING IN THE DEVELOPMENT AND CONSERVATION OF OUR NATURAL RESOURCES, HAVING IN MIND THE WELFARE OF ALL THE PEOPLE.

We readily recognize and agree that Indian treaties are to be construed in a broad and liberal spirit.

We think, however, in the interests of the Indians of today and the obligations owing to them from the State

of Washington in the light of their present status as full-fledged citizens, an Indian treaty must be reconciled in the light of present day conditions because the respective positions of both parties to the treaty, the red man and the white man, the sovereign state and the Indian nation, have changed. In fact, this is the express pronouncement of the Supreme Court in the case of *State ex rel. Kennedy v. Becker*, 241 U. S. 556, 36 S. Ct. 705, 60 L. Ed. 1166, at page 562 of 241 U. S., 36 S. Ct. 705, 707:

"It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing, to which the legislation in question was addressed. Adopted when game was plentiful,—when the cultivation contemplated by the whites was not expected to interfere with its abundance,—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. * * * ."

Mr. Justice Hughes, in the case of *West Coast Hotel Company v. Parrish*, 300 U. S. 379 (commonly known as the Washington Minimum Wage Law Case), stated that the reasonableness of the exercise of the police power of the state must be considered in the light of current economic conditions.

The word "economic" is defined in Webster's New International Dictionary, Second Edition (1938), as follows: "Of or pertaining to the management of the affairs of a government or community with reference to its source of income, its expenditures, the development of its natural resources, etc., * * * ."

X.

THE INDIAN, BY ACT OF CONGRESS IN 1924, HAS BEEN MADE A CITIZEN OF THE UNITED STATES AND OF THE STATE IN WHICH HE RESIDES. AS SUCH, HE IS ENTITLED TO ALL THE RIGHTS, PRIVILEGES AND IMMUNITIES ACCORDED OTHER CITIZENS OF THE STATE, AND TO THE EQUAL PROTECTION OF ITS LAWS, AND IS ALSO SUBJECT TO ITS LAWS.

In the case of *Cherokee Nation v. State of Georgia*, 30 U. S. (5 Pet. 1) 1, decided in 1831, Chief Justice Marshall spoke of the Indian tribes as being in a "state of pupilage; their relation to the United States resembles that of a ward to his guardian." Congress has always exercised complete sovereignty over the Indians and Indian property. In the gradual unfoldment of the government's program to emancipate the Indian, the evolution of the Indian to the full stature of citizenship is one of the most interesting. In the case of *Choteau v. Burnet*, 283 U. S. 691, it was held that the income received from the United States by an Indian, a member of the Osage tribe, as a share from the royalties from the gas and oil leases made by the tribe, is subject to Federal income tax. Mr. Justice Roberts, delivering the opinion of the court, very pointedly sets forth some of the corresponding obligations of citizenship:

"The course of legislation discloses that the plan of the Government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privileges of the ownership of property, including the duty to pay taxes."

It has been a policy of the national government to encourage the Indians to abandon their tribal relations

and to adopt the life and customs of civilization. Looking to this end, various treaties with the Indian tribes, and special acts of Congress, have provided for allotment of lands to individual Indians, which lands were ultimately to become their property. Such Indians have been required to sever their tribal relations, live on their allotments, and adopt the life and habits of civilized white men. As a further inducement to complete abandonment of their tribal status and old ways of living, Indians to whom such allotments were granted were made citizens of the United States. The Act of Congress of February 8, 1887 (24 Stat. 388, p. 6), known as the "Dawes Act," provided that "Every Indian born within the territorial limits of the United States, to whom allotments (of land) shall have been made under the provisions of this act, or under any law or treaty, * * * is hereby declared to be a citizen of the United States and entitled to all the rights, privileges and immunities of such citizen." An Act of Congress of March 3, 1901, amending the "Dawes Act," conferred citizenship on the same terms to all Indians in the Indian Territory. And finally, on June 2, 1924 (43 Stat. 253), Congress enacted "That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby declared to be citizens of the United States."

The rule found in 11 Corpus Juris 786 was cited in *People v. Chosa*, 252 Mich. 154, 162, 233 N. W. 205.

"When one becomes a citizen of the United States, he casts off both the rights and obligations of his former nationality and takes on those which pertain to other citizens of the country."

Our courts have held that merely because a party is an Indian, even a tribal Indian, does not necessarily ex-

clude him from the jurisdiction of the state courts nor exempt him from state law. A tribal Indian may be prosecuted in the state courts for a crime committed within the state but outside the reservation. *In re Wolf*, 27 Fed. 606; *United States v. Sa-Coo-Da-Cot*, Fed. Cas. No. 16212, 27 Fed. 923; *Rubideux v. Vallie*, 12 Kan. 28; *State of Washington v. Williams*, 13 Wash. 335, 43 Pac. 15. Moreover, unless specific stipulation is made in the enabling act giving the national government jurisdiction over Indian reservations within a state, the state has jurisdiction within the reservations to enforce state law with respect to persons other than Indians. *Blue-Jacket v. Johnson County Commissioners*, 72 U. S. 737; *Harkness v. Hyde*, 98 U. S. 476; *Langford v. Monteith*, 102 U. S. 145; *United States v. McBratney*, 104 U. S. 621; *Draper v. United States*, 164 U. S. 240.

Concerning an Indian's status upon becoming a citizen of a state, the United States Supreme Court said in *In re Heff*, 197 U. S. 488:

"It would seem that Congress intended citizenship of the United States to attach at the same time that the Indian becomes subject to the laws of the state or territory in which he resides. *As a matter of constitutional law, an Indian appears to be entitled to the benefit of, and to be subject to, the laws of the State in which he resides the moment he becomes a citizen of the United States.* By virtue of the 14th Amendment a citizen of the United States becomes, by residence therein, a citizen of the state, and entitled to all the rights, privileges and immunities of other citizens of the state, and to the equal protection of its laws. *Slaughter-House* cases, 16 Wall. 36, 21 L. Ed. 394." (Italics ours.)

In re Heff involved the sale of liquor to an allotted Indian, and the court held that the allotted Indian was removed from the domain of the Federal statutes specifi-

cally relating to him as an Indian. The *Heff* case was subsequently overruled in *Hallowell v. United States*, 221 U. S. 317, 31 S. Ct. 587; *Tiger v. Western Improvement Co.*, 221 U. S. 286, 31 S. Ct. 578, and in *United States v. Nice*, 241 U. S. 591, 36 S. Ct. 696, but only in so far as the *Heff* case was authority for the proposition that an Indian on becoming a citizen of a state was no longer subject to national guardianship. The *Nice* case held that the mere fact an Indian had become a citizen, and subject to state law, did not abrogate the United States authority over him.

"Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection."

U. S. v. Nice, 241 U. S. 591, 598.

We quote further from the *Nice* case at page 600:

"As pointing to a different intention, reliance is had upon the provision that when the allotments are completed and the trust patents issued the allottees 'shall have the benefit of and be subject to the laws, both civil and criminal, of the state' of their residence. *But what laws was this provision intended to embrace? Was it all the laws of the state, or only such as could be applied to tribal Indians consistently with the Constitution and the legislation of Congress?* The words, although general, must be read in the light of the act as a whole, and with due regard to the situation in which they were to be applied. That they were to be taken with some implied limitations, and not literally, is obvious. The act made each allottee incapable during the trust period of making any lease or conveyance of the allotted land, or any contract touching the same, and, of course, there was no intention that this should be affected by the laws of the state. The act also disclosed in an unmistakable way that the education and civilization of the allottees and their children were to be under the direction of Congress, and plainly the laws of the state were not to have any bearing

upon the execution of any direction Congress might give in this matter. The Constitution invested Congress with the power to regulate traffic in intoxicating liquors with the Indian tribes, meaning with the individuals composing them. That was a continuing power of which Congress could not divest itself. It could be exerted at any time and in various forms during the continuance of the tribal relation, and clearly there was no purpose to lay any obstacle in the way of enforcing the existing congressional regulations upon this subject, or of adopting and enforcing new ones, if deemed advisable." (Emphasis ours.)

The *Tiger* and *Hallowell* cases merely stand for the proposition that "guardianship" of the national government over the Indian remains unimpaired by the grant of citizenship, so far, at least, as the guardianship relates to the power of Congress over the lands and property of such citizen Indians. That is, citizen Indians living within a state, outside a reservation, may enjoy by virtue of this relationship to the national government a position of special privilege and protection, in certain respects, not enjoyed by other citizens of the state.

None of these cases overruled the *Heff* decision relative to the rights and obligations of an Indian upon becoming a citizen of a state. These authorities do not say that the conferring of citizenship on an Indian is an empty right, that he is not entitled to all the privileges and immunities enjoyed by a citizen under state government. Nor do they say an Indian citizen is not subject to its laws, upon acquiring its benefits.

In the case at bar, no legislation of Congress in behalf of its wards is in issue. In fact, the exercise of a state's inherent police power is beyond the jurisdiction of the federal government's interference. Concededly, it was

within the power of Congress to withhold or even deny the granting of citizenship to the Indian. By conferring citizenship on the Indian, Congress could not compel the state to exempt him from the exercise of its police power which can only be validly exercised for the benefit of all citizens alike. Clearly, if a state discriminated against the Indian citizen in the exercise of its police power, the laws of the land would protect him and prevent such discrimination. (*Lawton v. Steele*, 152 U. S. 133.)

It is further observed that the federal enactment referred to in the *Hallowell* and *Nice* cases was in the interest of the Indians. Can it be argued less forcefully that the state, in enacting legislation looking to the conservation of its fisheries in the interest of its citizens, is doing so in any less degree for the benefit of the Indian citizen than for any other citizen? What other sovereignty than the state has jurisdiction to so legislate? The Federal government is powerless to invade a state's domain and regulate its fisheries. *Pollard v. Hagan*, 3 How. 212; *Smith v. Md.*, 18 How. 71; *Martin v. Waddell*, 16 Pet. 410; *McCready v. Va.*, 94 U. S. 391; *Manchester v. Mass.*, 139 U. S. 240; *Lawton v. Steele*, 152 U. S. 133; *Ill. v. Ill. Cent. R. R. Co.*, 146 U. S. 387; *Wharton v. Wise*, 153 U. S. 155; *Mann v. Tacoma Land Co.*, 153 U. S. 273; *Hardin v. Jordan*, 140 U. S. 371; *Shively v. Bowlby*, 152 U. S. 1; *The Abby Dodge*, 223 U. S. 166.

XI.

CONSERVATION OF OUR FAST DIMINISHING NATURAL RESOURCES IS ONE OF THE CHIEF CONCERNS OF ORGANIZED GOVERNMENT TODAY. IN THE DISCHARGE OF THIS IMPORTANT RESPONSIBILITY FOR AND ON BEHALF OF ITS PEOPLE, THE STATE OF WASHINGTON IS ACTING AS MUCH IN THE INTEREST OF THE INDIAN CITIZEN AS ANY OTHER, AND ITS OBLIGATION TOWARD HIM IS JUST AS GREAT, FOR THE INDIAN IS NOW AN INTEGRAL PART OF ITS CITIZENRY.

Circuit Judge Stevens, in his concurring opinion, in *Cerritos Gun Club v. Hall*, 96 Fed. (2d) 620, 630, described the need for conservation of our fast diminishing wild life in two poignant expressions, which we quote:

> "Their preservation (referring to migratory birds of North America, subject to the Migratory Bird Treaty Act) is of great importance, and, therefore, a legitimate subject of governmental attention. * * * The nations have waited too long."

The State of Washington is here seeking to enforce adequate protective measures to prevent exhaustion of the salmon supply in the waters over which it has supreme jurisdiction. "After us the deluge" seems to be the maxim of many people in America today on the utilization of natural resources. Conservation seeks to insure to society the maximum benefit from the wise use of those resources. It is a timely field of action in the United States. As the nation comes of age and the limits of its resources and the character of its needs begin to appear more fully, the necessity for greater care in the utilization and renewal of the resources becomes impressive. It involves the welfare not only of the present generation but future generations whose material prosperity and social

well-being depend so largely upon the possession and enjoyment of our natural endowments.

We respectfully invite the attention of this court to two public documents prepared by the United States Bureau of Fisheries in Washington, D. C. The first is Document 2000 (issued in September, 1935), I-81, entitled, "Conservation Work of the Bureau of Fisheries." We quote from page 8:

"A greater appreciation of the necessity for conserving our fisheries has undoubtedly been brought about by the serious depletion of some of the most important of them. *The sturgeon has all but disappeared from both coastal and inland waters; the salmon of the Atlantic Coast have been entirely exterminated in many streams, and in others only a small remnant of the former runs remains; in certain streams on the Pacific Coast the salmon are much reduced;* the halibut on both coasts have been distinctly reduced in numbers, unquestionably as a result of overfishing; the shad and mullet of the east coast and the whitefishes and related forms of the Great Lakes have been affected, and the production of oysters has markedly declined.

" * * * Except in the Territory of Alaska and with respect to the taking of sponges in the extra territorial waters of Florida, *the Bureau of Fisheries is without power to regulate fishing, for under the Federal form of government Congress exercises only such powers as are delegated under the Constitution and complete jurisdiction of the fisheries has remained in the hands of the individual states.* * * * ." (Italics ours.)

The second is Fisheries Document No. 1092, entitled, "Pacific Coast Salmon Fisheries." We quote from page 410:

"The most valuable commercial fisheries in the world, excepting only the oyster and herring fisheries, are those supported by the salmons. Of these the most important by far are the salmon fisheries of the Pacific coast of North America, where California, Oregon, Wash-

ington, and Alaska, including also British Columbia, possess industries representing millions of dollars of investment and millions of output annually."

For whom is the fast diminishing supply being conserved by the State of Washington through the valid exercise of its inherent police powers? Only for the white man and not for the red man? Clearly not, for the Indian is now a full-fledged citizen, who can assert any of the rights and privileges of citizenship claimed by the white man. Can the Indian citizen be allowed special privileges which are as detrimental to him in the end as they are to his fellow white citizen? In fact, through the exercise of his voting privilege, the Indian as a citizen of the state, helped to place on the statute books these protective measures, from which he is now asking freedom from restraint to enjoy the very fruits of their objective, while his fellow citizen is amenable thereto.

To hamper the state in the exercise of its police power in this regard by allowing the Indian citizen to escape the reasonable regulatory measures designed to maintain the supply of its fisheries would be merely to thwart the state in coping with what is recognized today as one of its greatest problems. Who would question the wisdom and right of the Federal government to erect the huge power dams as national defense measures and to give civilization as now constituted the manifold benefits to be derived from the development of hydroelectric energy? These dams are threatening the continued existence of a great natural resource, our fish, in which the Indian has a vital interest. In fact, the guardian itself is responsible for gradually destroying the ancient fishing sites of its wards along the Columbia River. The

state is waging a militant conservation warfare, in the face of almost insurmountable obstacles, to prevent the ever-increasing diminution, indeed th complete extinction, of the salmon fisheries, which once made the Northwest a "happy hunting and fishing ground."

The government's interest as guardian of the Indian wards, and the state's interest in behalf of all its citizens are not, or should not be, at variance: Indeed, it should be as much the concern of the guardian national government in behalf of its Indian wards, to see that the fisheries of the Columbia River are not exhausted by uncontrolled fishing methods as it is the concern of the State of Washington. Commercial salmon fishing is here involved. If the government's wards must depend upon monetary return from commercial fishing for a livelihood, and this cannot be accomplished by the Indians through fishing according to reasonable state regulations, using the same types of gear and given the same fishing privileges accorded the ordinary citizen, then it is in the interest of the Indian, and in the interest of the welfare of the state and nation for the guardian to give the Indians an outright subsidy. Money can be replenished through coining; fish cannot be replaced once the fish themselves are exterminated.

CONCLUSION

Upon its face, this case perhaps does not appear to be of great importance. Viewed superficially and from a sentimental standpoint, it may seem that the State of Washington is not in an equitable position when it seeks to collect license fees from the Yakima Indians who are catching salmon for a livelihood. This is negatived by the benevolent acts of the Washington State Legislature which has enacted legislation permitting the Indian to fish at any time, without a license, for the consumption of himself and family in any of the salt waters bordering any Indian reservation or within one-half mile thereof, or fish with set net in any river within five miles of the borders of an Indian reservation (Chapter 31, Session Laws of the State of Washington, 1915). At the 1939 session of the legislature (Chapter 210, Laws of 1939), special fishing privileges were granted the Sokulk Band of Indians who have no reservation and are nomads, to take fish for personal use in designated fishing areas.

The case, however, is of far greater importance than disclosed by the record. This particular treaty provision is common to all the Indian treaties in the state so far as we are able to ascertain. The net result is that these treaties, taken in concert, cover practically every *usual and accustomed place of fishing in the State of Washington.* Four Federal injunction suits are now pending in Federal District Courts in Washington to restrain the state fisheries officials from interfering with Indian commercial fishing exploitations outside the reservations. Others are being held in abeyance pending the outcome of the case at bar.

As a matter of public record, the 1930 government census showed 11,253 Indians in the State of Washington, which was an increase of 2,192 over the 1920 census. An additional 1,543 Indians were listed in 1930 as residents of Oregon, but sharing special privileges in fishing on the Columbia River. The official 1940 census figures are not yet compiled. According to the best available figures furnished by Indian agents, in 1938 there were 13,644 enrolled Indians living on reservations throughout the state, with an additional 500 (approximately) who were not enrolled in any agency.

Commercial fishing has developed upon a scale not even contemplated when the treaties were made, and the economy of the lower Columbia River area is dependent upon the wise regulation of the Columbia River salmon fishery by the only existing legal authorities, the states of Washington and Oregon. Many of the Indian tribes now make a business of fishing commercially. The 1940 annual Indian catch statistics, compiled by the state fisheries departments of Washington and Oregon, as required by law, show that 2,113,378 pounds of salmon and trout, including 1,616,510 pounds of Chinook and 340,875 pounds of Steelhead trout, were caught by Indians at Celilo Falls, the fishing site on the Columbia River involved in this case. These fish were sold to commercial fish buyers who are required by law to report the source and amounts of fish purchased.

Regardless of the relative importance or nonimportance of the case, as stressed by both the Federal government and the State of Washington, the sole issue is the extent of the police power of the State of Washington. We respectfully submit, as a matter of law, that

the Stevens Treaty of 1855 vouchsafed to the confederated Yakima Tribe perpetual easement rights of ingress to and egress from their usual and accustomed fishing grounds, there *to fish in common with the citizens of the territory;* that the Enabling Act admitted Washington into the Union invested with all the powers inherent to a sovereign state, including the right to regulate its internal affairs for the welfare of its citizens; that, accordingly, the fishing right granted by the treaty is subject to the paramount and superior right of the state under the exercise of its sovereign police power to regulate the taking of fish from the waters within its jurisdiction; that Congress in 1924 granted the Indian full citizenship, and the Indian citizen can now fish in common and on a parity with the citizens of this commonwealth; and that therefore the judgment of the Supreme Court of the State of Washington should be affirmed.

Respectfully submitted,

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FILE COPY

IN THE

Supreme Court of the United States

No. 318,

SAMPSON TULEE, *Appellant*,

v.

STATE OF WASHINGTON, *Appellee*.

Appeal from the Supreme Court of the State of Washington.

APPELLEE'S REPLY BRIEF.

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IN THE

Supreme Court of the United States

No. 318.

SAMPSON TULEE, *Appellant*,

v.

STATE OF WASHINGTON, *Appellee*.

Appeal from the Supreme Court of the State of Washington.

APPELLEE'S REPLY BRIEF.

CLARIFICATION OF QUESTION INVOLVED.

Because of the conflict between State and Federal jurisdiction, this case is of transcendant importance to both the United States Government and the State of Washington for the purpose of settling the question as to whether or not Indians of various tribes have the right to fish at usual and accustomed places off their reservations, at points otherwise wholly within the State of Washington, without being subject in any manner whatsoever to the state's fish and game laws. This question arises under a treaty provision common to some nine treaties negotiated by Isaac I. Stevens, Governor and Superintendent of Indian Affairs of Washington

Territory in 1855[1] with the several tribes and bands of Indians found in that section of the Northwest now constituting the State of Washington, which provision reads as follows:

> "The exclusive right of taking in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, *as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory*, and of erecting temporary buildings for curing them * * * (Par. II of Article III, Yakima Treaty—12 Stat. 951.) (The words italicized appear in all of the Stevens treaties.)

While appellant's brief repeatedly refers to the regulation involved as a "state licensing statute,"[2] and seems to infer throughout argument that the particular fishing statute is violative of the treaty provision because of its particular requirements, and emphasizes that the character of its regulatory features in effect imposes a further monetary consideration for rights secured by the treaty, we assume that the broad issue herein presented is still the applicability of any valid state fishing regulation to Indians who claim immunity therefrom by reason of the Stevens treaties in their "off the reservation" fishing activities. We do not understand that appellant now seeks to narrow the issue to whether or not the particular fishing statute is a valid exercise of the state's police powers. That the former was considered to be the primary issue and was

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[1] Article 3, Treaty of Dec. 26, 1854, with Nisqualli, Puyallup, etc., 10 Stat. 1132; Article 5, Treaty of Jan. 22, 1855, with Dwamish, Suquamish, etc., 12 Stat. 927; Article 4, Treaty of Jan. 26, 1855, with S'Klallam, 12 Stat. 933; Article 4, Treaty of Jan. 31, 1855, with Makah, 12 Stat. 939; Article I, Treaty of June 9, 1855, with Walla Walla, Cayuse, etc., 12 Stat. 945; Article 3, Treaty of June 11, 1855, with Nez Perces, 12 Stat. 157; Article 1, Treaty of June 25, 1855, with Tribes of Middle Oregon, 12 Stat. 963; Article 3, Treaty of July 1, 1855-Jan. 25, 1856, with Quinaielt, etc., 12 Stat. 971; Article 3, Treaty of July 16, 1855, with Flatheads, etc., 12 Stat. 975.

[2] Sec. 5703, Remington's Revised Statutes of Washington.

urged by both the United States Government and the State of Washington in the court below, and was ultimately decided by that court, is made plain by the following excerpt from the opinion (Transcript of Record, P. 17):

> "The only question raised upon this appeal is whether appellant, as a member of the Yakima tribe of Indians, was, under the treaty between the United States and the Yakima tribe, entitled to catch fish in the Columbia River, without the territorial limits of the Yakima Indian reservation, without regard to the statutes of the state of Washington covering the taking of food fish from the lakes and rivers within this State."

Therefore, we do not now regard appellant's frequent reference to the "state licensing statute" as an attempt to side-step the fundamental issue raised in this case, the final determination of which will be controlling of the similar issues obtaining in the several injunction suits now pending.[3]

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[3] In both Northern and Southern Divisions of the Western District of Washington, actions have been brought by Indians individually and on behalf of their respective tribes, through private counsel, presenting precisely the same issue as presented in this case. In 1937, members of the Nisqually Tribe of Indians brought an injunction suit entitled "*Chief Peter Kalama, et al.* v. *Brennan, et al.*, (Cause No. 598) in the Western District of Washington, Southern Division, and District Judge Cushman issued a preliminary injunction, restraining the state law-enforcement officers from interfering with Indian fishing operations in the Nisqually River from the northern border of the Nisqually Indian Reservation to its mouth on Puget Sound. Judge Cushman retired from the bench before the petition for permanent injunction could be heard. Meanwhile, the United States Attorney for the Eastern District of Washington and the Attorney General of the State of Washington commenced the present suit in the State Superior Court. The government petitioned for a writ of habeas corpus in the Federal Court for the Eastern District of Washington (*United States of America in behalf of its Ward, Sampson Tulee*, v. *C. R. House, Sheriff of Klickitat County, Washington*). On June 22, 1939, Federal District Judge J. Stanley Webster, denied the petition and handed down an oral opinion, which was not officially reported, holding that the right secured to the Yakima Tribe of Indians by the Stevens Treaty referred to was subject to the paramount and superior

ARGUMENT IN REPLY.

The principal arguments advanced by appellant in this case, in the court below and on this appeal, have been vigorously urged upon this court and rejected by it in the leading cases upon which the appellee State of Washington relies, namely, *Ward* v. *Race House*, 163 U. S. 504, *Coyle* v. *Smith*, 221 U. S. 559, *U. S.* v. *Winans*, 198 U. S. 371, and *State ex rel. Kennedy* v. *Becker*, 241 U. S. 566.

That the holdings in these landmark cases have been recognized and accepted by the appellant government up until the time of this appeal is evidenced by the opinion of the Solicitor for the Department of Interior, dated April 5, 1934, (Vol. 54, Decisions of the Department of Interior, p. 418) whose conclusions at that time were identical with the position of the appellee State of Washington in this case, and in full consonance with the effect given these cases by

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right of the state, in the exercise of its sovereign police powers, to reasonably regulate the taking of salmon from the waters within its jurisdiction. On appeal, the United States Circuit Court of Appeals for the Ninth Circuit (110 Fed. 2nd 897-801) held that insofar as the question raised "involved treaty or constitutional rights", the state courts "are as competent as the federal courts to decide them" and in pursuance thereto, the case at bar was commenced anew in the state courts. While the Tulee case was proceeding through Federal courts, District Judge Bowen in the Northern Division of the Western District of Washington, in *Sampson* v. *Brennan*, 39 Fed. Supp. 74, granted a preliminary injunction, holding in the following written opinion: "In view of the rulings by Judge Cushman of this court in *Mason* v. *Sams*, 5 Fed. 2nd 255, and in *Chief Peter Kalama, et al.* v. *Brennan, et al.*, Cause No. 598, Western District of Washington, Southern Division, order of Nov. 3, 1937, plaintiff's motion for temporary injunction herein will be granted.". In June, 1941, District Judge Bowen granted a permanent injunction in the case of *Makah Indian Tribe, et al.* v. *B. T. McCauley, et al.*, No. 218 (39 Fed. Supp. 75) which case is now on appeal to the Circuit Court of Appeals for the Ninth Circuit. In 1941, District Judge Black in the Southern Division, Western District of Washington, granted a preliminary injunction in the *Quileute Indian Tribe* v. *B. T. McCauley*, but deferred consideration of the case on its merits pending the outcome of the appeal herein.

the highest courts of Washington,[4] Michigan,[5] Wisconsin,[6] New York.[7] In fact, appellee's position could not be more succinctly stated than by employing the language of the Solicitor's opinion, which we herewith set forth:

"MARGOLD, Solicitor:

Near Celilo Falls, on the Oregon shore of the Columbia River, is a small Yakima village called Celilo. For many generations the Columbia River at this point has been a usual and accustomed fishing place of the few Indians who have made their homes at Celilo and of other members of the tribe. Celilo is not within the Yakima Reservation but is upon a seven-acre tract owned by the United States. In 1929, Congress placed this tract under the control of the Secretary of Interior "for the use and benefit of certain Indians now using and occupying the land as a fishing camp site." (45 Stat. 1158)

The Treaty between the United States and the Yakama (usually designated Yakima) Nation of Indians was concluded June 9, 1855. (12 Stat. 951) . Article 3 of that treaty provides that "the exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." The nature of the fishing privilege thus reserved at usual and accustomed places outside the Yakima Reservation has been adjudicated by the Supreme Court of the United States.

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[4] *U. S.* v. *Taylor*, 3 Wash. Terr. 88; *State of Washington* v. *Towessnute*, 89 Wash. 478; *State of Washington* v. *Alexas*, 89 Wash. 492; *State of Washington* v. *George Meninock*, 115 Wash. 528; *State of Washington* v. *Jim Wallahee*, 143 Wash. 117; *State of Washington* v. *Tulee*, 107 Wash. 2nd 16.

[5] *People* v. *Chosa*, 252 Mich. 154.

[6] *State* v. *Morrin*, 136 Wis. 552, (1908); *State* v. *La Barge*, 234 Wis. 449 (1940).

[7] *State ex rel. Kennedy* v. *Becker*, 215 N. Y. 42.

"It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the State (Greer v. Connecticut, 161 U. S. 519; Ward v. Racehorse, 163 U. S. 504, 507), subject of course to any valid exercise of authority under the provisions of the Federal Constitution. It is not denied—save as to the members of this tribe—that this inherent power extended over the *locus in quo* and to all persons attempting there to hunt or fish, whether they are owners of the lands or others. The contention for the plaintiffs in error must, and does, go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty *quoad hoc*. As the plaintiffs in error put it: 'The land itself became thereby subject to a joint property ownership and the dual sovereignty of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be.' We are unable to take this view. It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the locus in quo, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.

* * * We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather we are of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. This was clearly recognized in United States v. Winans, 198 U. S. 371, 384, where the court in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859, said (referring to the authority of the State of Washington): "Nor does

it'' (that is, the right of 'taking fish at all usual and accustomed places') "restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.'' Kennedy v. Becker, 241 U. S. 556, 562, 562-564 (1916).

In accord are the cases of *United States* v. *Winans,* 198 U. S. 317 (1905); *People* v. *Chosa,* 252 Mich. 154, 233 N. W. 205 (1931). It follows that a regulation of fishing imposed by a State, operative on all persons alike, reasonably adapted to the preservation of wild life in the waters of the State for the common benefit, and not in its intendment or operation a denial to the privileged Indian community of its right to fish, is lawful, and not a treaty violation. This principle permits a State to restrict the devices and types of tackle which fishermen generally, including the privileged Indian community, may employ in the waters within its jurisdiction. *Kennedy* v. *Becker, supra; State* v. *Towessnute,* 89 Wash. 478, 154 Pac. 805 (1916); *State* v. *Morrin,* 136 Wis. 552, 117 N. W. 1006 (1908).

The Columbia River is under the concurrent jurisdiction of the States of Oregon and Washington (10 Stat. 90; 11 Stat. 383) and the power of each State to regulate fishing in the river is established. *McGowan* v. *Columbia Packers' Association,* 245 U. S. 352 (1917); *Nielson* v. *Oregon,* 212 U. S. 315 (1908).

The first question propounded by the Commissioner of Indian Affairs concerns the use of a "willow weir,'' a device long employed by the Indians to obstruct a stream in such wise that the salmon run is directed through a particular channel. The Commercial Fisheries Code of Oregon makes it "unlawful for any person or persons to operate or maintain * * * any fish traps, weir * * * or any device * * * used in catching salmon * * * without first having obtained * * * a license therefor.'' Oregon Code Ann. (1930) Sec. 40-503. See also Secs. 40-309 ff. All funds derived from license fees are employed under the direction of the State Fish Commission in the preservation, propaga-

tion and protection of fish, the maintenance of hatcheries and related enterprises. Sec. 40-105. The classification of fishing devices is entrusted to the State Fish Commission Sec. 40-115. It does not appear that any regulation promulgated by the State Fish Commission discriminates against Indian fishermen. Nor it is claimed that license to employ any device has been refused to Indian fishermen arbitrarily.

Therefore, answering question 1, it is my opinion that the Treaty of 1855 does not reserve to the Yakima Indians the privilege of constructing a "willow weir" in the channel of the Columbia River at Celilo Falls in disregard of the State laws and regulations above mentioned.

The second question concerns the right of the State to require the Indians to secure a license for the selling of fish and to require that they pay poundage tax upon such sales. Such requirements are imposed by the Commercial Fisheries Code and operate equally upon all persons. Secs. 40-501, 40-515. The privilege reserved in the Treaty of 1855 is expressly defined as a "right of taking fish." It cannot be construed as an exemption from the general laws of the State taxing and regulating the sale of fish. It does not appear that a license has been required for or a tax imposed upon the sale of fish by the Indians upon their reservation or at any other place under the jurisdiction of the United States. Answering question 2, it is my opinion that no Indian may lawfully sell fish at any place within the jurisdiction of the State of Oregon unless he shall have obtained a license for that purpose and shall pay such tax as the State may impose upon vendors. Of course, any discriminatory treatment Indians vendors in the administration of these regulations would be unlawful."

Furthermore, the unreported opinion of Acting Solicitor Kirgis of the Department of the Interior, dated June 15, 1937 (referred to on Page 40, Appellant's Brief) does not overrule the previous opinion of April 5, 1934, cited above. In the latter opinion, the Acting Solicitor concludes that

the Indians may have a possible claim against the government for the destruction of their fishing places on the Columbia River occasioned by construction of the Bonneville Dam by the United States.

The policy which the government may adopt towards its Indian wards has nothing whatsoever to do with the issue involved herein. The fact that the government, as stated in the opinion, may feel morally or legally obligated to provide monetary reimbursement to the Indians for the extinguishment of fishing sites through its hydroelectric developments does not alter the effect of the decisions of this court on the question of the state's power to reasonably regulate the fishing operations of all those entitled to enjoy the privilege in waters within its jurisdiction. Indeed, appellant has nowhere asserted that the United States has any authority whatsoever to make provision for the protection of fish in the waters of the State of Washington. No such authority has been ceded to the Federal Government. The state's fisheries are local in nature, and particularly the salmon fisheries in the Columbia River, since the salmon themselves spawn in the tributaries and headwaters found within the state. A conservation law, operative upon the people of the state, but not operative upon the Indians when within the state but off their reservations who are privileged to enjoy fishing in common with all citizens, would not subserve the interests of either the Indian citizen or the white citizen. The state, through its fish and game laws, is exercising an inherent obligation of sovereignty when it conserves and perpetuates a valuable food supply in which all the people of the state have a common concern.

The ever growing magnitude of the state's conservation problems on the Columbia River alone is recognized in the opinion *sub silentia* in the admitted destruction of fishing sites by the United States government and the concomitant diminution of the supply in accommodating the fish runs to new and unnatural conditions.

Appellee does not differ, but on the other hand, agrees with the Acting Solicitor in his opinion cited above that the

cases of *United States* v. *Winans* and *Kennedy* v. *Becker* stand for the proposition that the treaties perpetually guaranteed the Indians against any discrimination toward them in their fishing activities "at usual and accustomed places in common with the citizens of the Territory." THE CASES, HOWEVER, HOLD THAT THE INDIANS AND ALL OTHERS WHO PARTICIPATE IN THE TAKING OF FISH FROM THE WATERS WITHIN THE JURISDICTION OF THE STATE ARE SUBJECT TO ANY REASONABLE AND APPROPRIATE REGULATION INHERENT IN THE SOVEREIGNTY OF THE STATE WHICH MAY BE NECESSARY FOR THE PRESERVATION OF WILD LIFE.

TREATY WAS NOT AN ATTEMPT BY THE UNITED STATES TO ABRIDGE THE STATE'S POLICE POWERS. IT WAS INTENDED TO SECURE THE TRIBE FROM ANY DISCRIMINATION AS TO FISHING PRIVILEGES "AT THEIR USUAL AND ACCUSTOMED FISHING PLACES" OFF THE RESERVATION AGAINST THE TRIBAL MEMBERS IN FAVOR OF THE CITIZENS OF THE UNITED STATES.

Appellant in this court, and in the court below, relies principally on the case of *United States* v. *Winans, supra,* and attempts to distinguish *Ward* v. *Race Horse, supra, Coyle* v. *Smith, supra,* and *Kennedy* v. *Becker, supra,* which cases appellee submits are controlling. We shall, therefore, discuss each case in its chronological order:

(1) *Ward* v. *Race Horse* was decided by this court in 1896. Race Horse, a Bannock Indian who retained his tribal relation and resided on a reservation, was convicted of violation of game laws of Wyoming on unoccupied public lands of the United States not within a reservation. The Treaty (15 Stat. 673) made when Wyoming was a territory, provided that the Indians

> "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found

thereon, and so long as peace subsists among the whites and Indians on the border of the hunting districts."

The Circuit Court held that the Act of Congress admitting Wyoming into the Union did not by necessary implication repeal or abrogate the treaty, and that the treaty provision remained in force. The decree was reversed on appeal to this court.

Appellant herein attempts to distinguish the case at bar on the ground that the hunting rights reserved in the *Race Horse* case were of an ephemoral nature, as distinguished from a continuous or perpetual right. This was the exact view entertained by the Circuit Court, which had held the right was a continuing one and survived Wyoming's full fruition of statehood.

The *Race Horse* decision, in substance, holds that Congress has the power by subsequent statute to abrogate the provisions of an Indian Treaty and that when an act of Congress admits a state into the Union, and declares without reservation that such state shall have all the powers of the other states of the Union, this constitutes an abrogation of any previous treaty stipulation with the Indians within the territory of such state respecting their right to take fish and game; that to exempt Indians from state laws regulating fishing and hunting within the border of a state after its admission into the Union would deprive the state of its sovereign power to regulate the rights of hunting and fishing, and would deny to such state admission into the Union on an equal footing with the original states, on the ground that a treaty with the national government giving the right to hunt and fish within a territory which subsequently is embraced within the limits of a state is a privilege in conflict with the act of admitting the state into the Union on an equality with the other states and is repealed thereby. We quote from page 514 of the opinion:

"Determining, by the light of these principles, the question whether the provision of the treaty giving the right to hunt on unoccupied lands of the United States

in the hunting districts is repealed, in so far as the lands in such districts are now embraced within the limits of the state of Wyoming, it becomes plain that the repeal results from the conflict between the treaty and the act admitting the state into the Union. The two facts, the privilege conferred and the act of admission, are irreconcilable in the sense that the two under no reasonable hypothesis can be construed as coexisting."

This court has never repudiated the principles announced in the *Race Horse* case. To the contrary, it has cited the *Rase Horse* ruling with approval on the proposition of the equality of states to govern their internal affairs,[8] and has specifically reaffirmed the pronouncements therein on the question of a state's absolute power to regulate the taking of wild life within its border. We refer to *Kennedy* v. *Becker*, 241 U. S. 556, 562 (which case will be discussed later in this brief) and *Lacoste* v. *Dept. of Conservation*, 263 U. S. 545, 549.

In the *Lacoste* case, the state of Louisiana was upheld in the exertion of its police power to protect wild animals for the common benefit to the extent of requiring the payment of a tax upon their skins or hides as a condition precedent to transfer of its title to the dealer paying the tax. This court said, at pages 549 and 552:

"The wild animals within its borders are, so far as capable of ownership, owned by the State in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the State may regulate and control the taking, subsequent use and property rights that may be acquired therein. Geer v. Connecticut, 161 U. S. 519, 528; *Ward* v. *Race Horse*, 163 U. S. 504, 507; Silz v. Hesterberg, 211 U. S. 31, 39; Patsone v. Pennsylvania, 232 U. S. 138, 143; *Kennedy* v. *Becker*, 241 U. S. 556, 568; Carey v. South Dakota, 250 U. S. 118; State v. Rodman, 58 Minn. 393, 400. * * * Protection of the wild

[8] *Bollin* v. *Nebraska*, 176 U. S. 83, 88; *Coyle* v. *Oklahoma*, 221 U. S. 559, 573.

life of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection."

To the same effect is the case of *Van Camp Sea Food Co.* v. *Department of Natural Resources of State of California*, 30 F. (2nd) 111, decided by Circuit Judge Rudkin of the Ninth Circuit, on Jan. 18, 1929, which was cited with approval by this court in *Bayside Fish Co.* v. *Gentry*, 297 U. S. 422, 426 (1936). This court upheld the jurisdiction of the state fish and game commission to regulate and control the fish industry of the state, including fish canneries and fish reduction plants, or at any plant where fishery products are manufactured.

State courts, in passing upon the question of the applicability of fish and game laws to Indians while fishing off their reservations have recognized the authority of *Ward* v. *Race Horse*. See:

State v. *Morrin*, 136 Wis. 562 (1906);
State v. *LaBarge*, 234 Wis. 55[illegible] (1940);
People v. *Chosa*, 252 Mich. 154 (19[illegible]
Kennedy v. *Becker*, 215 N. Y. 42 (1915);
State v. *Tulee*, 107 Wash. 2nd 16 (1941); (citing prior decisions relying upon *Ward* v. *Race Horse*).

That the appellant government has heretofore accepted the recognized force and effect of *Ward* v. *Race Horse* and other land mark cases which have formulated the guiding principles of law relating to a state's police power over wild life found within its borders is further evidenced in a well-reasoned opinion by Acting Solicitor Fahy, rendered June 15, 1934 (54 Decisions of the Department of Interior, p. 517) in which it was held that the Migratory Bird Treaty Act of July 8, 19[illegible] (40 Stat. 755) is applicable to the Indians of the Swinomish Indian Reservation in the State of Washington, notwithstanding Article V of the Stevens Treaty of Jan. 22, 1855, reserving "the right of taking fish at usual and accustomed grounds and stations * * * in common with

all citizens of the Territory * * * together with the privilege of hunting * * * on open and unclaimed lands." We quote from page 520 of the opinion:

> "* * * And even though such laws (referring to acts of Congress) should conflict with the provisions of prior treaties with the Indians, there is respectable authority for upholding their validity. Thus in The Cherokee Tobacco Case (11 Wall. 616) it was held that a law of Congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was paramount to the treaty. And in *Ward* v. *Race Horse* (163 U. S. 504), the court ruled that the provision in the treaty of Feb. 24, 1869, with the Bannock Indians, whose reservation was within the limits of what is now the State of Wyoming, that 'They shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon', was superseded by the provisions of the Enabling Act admitting Wyoming into the Union, and that the treaty provision did not give the Indians the right to exercise the hunting privilege within the limits of the State in violation of its laws."

* * * * * * * * *

(2) *United States* v. *Winans*, 198 U. S. 371 (1905) is contended by appellant to be decisive in its favor for the proposition that Indians fishing at accustomed fishing sites off the reservation is beyond the pale of state regulation.

This was an action brought by the United States to enjoin Winans Bros., who were engaged in large commercial fishing enterprise, from refusing the Indians access to their ancient fishing places and depriving them of equal fishing rights by the actual monopoly of fishing privileges by maintenance of fishing wheels. This court very properly sustained the Indians in their treaty guarantees against discrimination. The only issue involved was a land owner's attempt to ignore the Indian's easement. The land in question had passed from the federal government by patent title to a white owner, who in addition, had secured from the State of Washington a license to erect and operate a fish-

ing wheel. The court held that the white owner had made it impossible for the Indian to enjoy fishing privileges on a parity with "citizens of the Territory". The case decided that the government grantee came into possession of land which was impressed with a perpetual servitude, or easement, and even the state could not grant something additional which would impair that easement. This was not a case brought against the state to restrain the exercise of its inherent police power, but involves an invasion by private individuals of the rights of the Indians thereby discriminated against as a class and so in this essential aspect the facts of the *Winans* case differ from the facts of the case at bar. The court was careful to point out that it was sustaining an easement as against private owners. After making clear that the provision in the treaty imposed a servitude on the land which could not be extinguished, the court said, at p. 384:

> "Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easement as enables the right to be exercised."

The Indians had been discriminated against, and deprived of equal fishing privileges with the whites. That the government did not seek to interfere with the state's regulation of fishing in the interest of all, is made very plain in the prayer of Solicitor-General Henry M. Hoyt, who represented the United States government. We quote from page 54 of Appellant's Brief, Vol. 34, Transcripts of Records and File Copies of Briefs (1904):

> "* * * It seems quite clear that the fish wheels are very destructive of fish, and therefore are improvident and unconscionable devices. It certainly seems that four wheels in the space of a mile and a half are inordinate. If they are to be maintained at all, there should be some restriction as to their number and method and daily hours of operation, in order to give the fish and the Indians a chance. Certainly the wheels should not be permitted to create and maintain a mo-

nopoly until all the fish and game are gone. * * * In any case, if it is true that they can fish to advantage elsewhere than at the particular points where the wheels are, they should be allowed to fish without undue restriction up and down the river and above and below the wheels throughout the entire water front. *On the other hand, they cannot claim to have an exclusive right, and enjoying their right in common with citizens and under the modified injunction in common with defendants, it may be just to restrict in reasonable ways their times and modes of access to the property and hours for fishing. If it is not fair under the present conditions that they should enjoy without restriction their ancient right of camping and curing fish in temporary houses on the defendants' property, a decree can indicate the proper limitation.* * *"

It is the appellee's contention that the *Winans* case stands for the proposition that the Stevens Treaty of 1855 vouchsafed to the confederated Yakima tribe perpetual easement rights of ingress to and egress from their usual and accustomed fishing grounds, there to *"fish in common with the citizens of the territory."*

This interpretation of the *Winans* case has been placed thereon by state courts who have considered the effect of the *Winans* decision[9], and is made cogently clear in the case of *Kennedy* v. *Becker, supra,* which we shall discuss next.

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[9] *State* v. *LaBarge*, 234 Wis. 552 (1940); *People* v. *Chosa*, 252 Mich. 154 (1930); *State* v. *Meninock*, 115 Wash. 528 (1921); *State* v. *Tulee*, 107 Wash. 2nd 16 (1941); *Kennedy* v. *Becker*, 215 N. Y. 42 (1915). The reasoning of the New York court in *Kennedy* v. *Becker*, and the interpretation of the *Winans* case is significant. In an unanimous opinion, participated in by Mr. Justice Cardozo, the court said. "* * * As has been said, this case does not deal with the rights of Indians on a reservation set apart for their use. It deals with the interpretation of a provision reserving to them the right in common with other people to take fish on territory which had been ceded away and which does not purport to secure to them an exclusive and special privilege, but simply one which might be enjoyed by them in common with other people. The right of the state to enact police legislation for the preservation of game and fish is so well recognnized and has been so widely exercised that

(3) *Kennedy* v. *Becker* was decided in 1916. The opinion was written by Mr. Justice Hughes before he resigned from the bench, and was adopted by the court and the opinion delivered by Mr. Chief Justice White.

We wish to point out that every major contention of the appellant in the case at bar was strenuously advanced therein by both the Plaintiff in Error and the United States government. In order to accede to appellant's position herein, it would be necessary for this court at this time to

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there is no need to spend any time in demonstrating or justifying its existence. Beyond any question it can exercise this power as against other people who enjoy in common with the Seneca Indians the right to fish in Eighteen Mile Creek. It seems to me that it would be an unusual and unreasonable interpretation of this reservation to hold that it relieved the Indians from all of these regulations which are applicable to such other members of the community. The interpretation that their rights are subject to the same regulation as would be applied to others seems much more reasonable and it does not by any means result in emasculating the reservation which was placed in their treaty. Except for such reservation they might be and very likely would be excluded from going upon the stream at all for fishing purposes. The reservation secures them against any such result as this and gives them a right or easement to go there as against their grantee and any other persons. This fundamental right will not be destroyed. It will simply be subjected to such regulation as the state deems to be necessary for the advantage of all of its inhabitants in preserving game and fish.

This construction is in accordance with what was said in *United States* v. *Winans* (198 U. S. 371, 384). There by treaty the right had been reserved to certain Indians of "taking fish at all usual and accustomed places in common with the citizens of the Territory of Washington." The state of Washington granted the right to use fishing wheels which practically excluded the Indians from fishing at all at certain point, and the question was whether the state might do this. It was held that it might not; that such a course would practically exclude the Indians from their right of taking fish. But it was said that the rights thus secured to the Indians of "taking fish at all usual and accustomed places" did not "restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised."

depart from the clear rule laid down by it in the *Kennedy* case.[10]

In the *Kennedy* case, three members of the Seneca tribe were arrested by law enforcement officials of the State of New York, and charged with violation of the state fish and game code. The defendants contended that as members of the Seneca Tribe they were entitled to fish without state restriction by virtue of the Treaty of Big Tree (1797) between the Seneca Nation and Robert Morris, which treaty had been made under the authority of the United States, and had been ratified by the senate and proclaimed by the president. A large tract of land had been ceded away by the treaty, which contained this reservation.

> "Also, excepting and reserving to them, the said parties of the first part and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed."

This court held that this was a guarantee of fishing privileges in common with the grantees and their heirs, that the lands were impressed with a servitude for the enjoyment thereof which could not be extinguished, but nevertheless, the Indians had no greater privileges than the grantees, and that the fishing privileges accorded to all were subject to the power of appropriate legislation inherent in the sovereignty of the state over the land where the privilege was exercised (quoting *U. S.* v. *Winans, supra*).

Appellant contends the language in the *Winans* case respecting the state's powers of appropriate regulation was *dictum*. If it be considered *dictum* in the *Winans* case in a strict technical sense, we submit that it was *judicial dictum*

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[10] The rule laid down by this court in *Kennedy* v. *Becker* has been adopted and followed in *State* v. *LaBarge*, 234 Wis. 552 (1940); *People* v. *Chosa*, 252 Mich. 154 (1930); *State* v. *Meninock*, 115 Wash. 528 (1921); *State* v. *Tulee*, 107 Wash. 2nd 16 (1941). Since 1916, the *Kennedy* case has been regarded as the settled law, and any departure at this time from the rule announced therein would have an important administrative effect in these several states and others which have followed this rule.

and not *obiter dictum*. It might be pointed out (1) that the language used by the court in the *Winans* case was part of the court's direct answer to the contention "• • • that the rights conferred upon the Indians are subordinate to the powers acquired by the state upon its admission into the Union" and (2) the court, in *Kennedy* v. *Becker*, expressly recognized the *Winans* case as authority for the proposition that the common fishing privileges secured on the ceded territory is subject to reasonable regulation by the state.

Appellant contends the case at bar can be distinguished in that (a) the existence of the sovereignty of New York was understood, (b) Seneca Treaty was not an engagement direct with the government, but was essentially like the function now performed by the Secretary of the Interior whose approval is required before certain types of contracts entered into by the Indians can become effective, and that once the approval is granted, the governmental purpose is fully achieved and the governmental interest and function in the transaction ceases. (Appellant's Brief, pp. 45, 47.)

To answer these contentions on the distinguishing features (a) The State of New York did not participate in the Big Tree Treaty. Under the Hartford Convention (exhaustively described by Mr. Chief Justice Stone in *Massachusetts* v. *New York*, 271 U. S. 64) its preemptive right of occupancy had been relinquished to the state of Massachusetts, whose representative consummated the treaty with the Hon. Jeremiah Wadsworth, commissioner appointed by the President of the United States to hold same in pursuance of the Constitution and act of Congress. It is idle to suppose that the Seneca Indians had any comprehension of the fine distinctions of sovereignty retained by the States of Massachusetts and New York respectively. What they really recognized, however, was the domination of the white man in their territory, and looked to the federal government to shield them in the negotiations which was to separate them from the whites, establish them on reservations exclusively their own, for their own protection. At the same time, they wanted the right to roam on the lands ceded for

the purpose of enjoying their ancient hunting and fishing privileges in common with the whites. The Senecas sought a treaty guarantee against unjust discrimination just as did the Yakimas in the Treaty in the instant case.

At the time of the Stevens Treaty, in 1855, Washington was then a Territory. Possibly the Indians did not fully comprehend the intricacies of existing and future government. They did know of the existence of white domination in the Territory, and realized the whites were migrating there in ever increasing numbers. Likewise, they looked to the Federal government to place them on reservations set apart for their exclusive use and enjoyment. As was said in the *Winans* opinion "The contingency of the future ownership of the lands was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it for the extent and for the purpose mentioned."

Another parallel in the case at bar and the *Kennedy* case, both as to historical background and contention urged in both cases, is suggested by the proceedings at the time the treaties were made. In the *Kennedy* case, the government filed an elaborate supplemental brief containing the minutes of the meeting with the Senecas, in support of its version of the Indians' understanding of the whole transaction. In the case at bar, the government filed the minutes of the proceedings in the Stevens Treaty, in support of its contention as to what the Indians understood that the transaction involved in the Yakima Treaty meant. A reading of either of these fascinating documents reveals that what the Indians clearly understood in each instance was that their respective territories, formerly occupied by them alone, were now being dominated by the whites in increasing numbers, that they were becoming subordinate to white law and that the government was separating them on reservations exclusively their own, and that their activities off the reservation were to be shared in common with the white man.

(b) The government's present contention that the transaction known as the Big Tree Treaty (7 Stat. 601) did not

rise to the dignity of a treaty is diametrically opposed to the contention by the government in the *Kennedy* case involving that very treaty itself. There, both the Plaintiff in Error and the government stressed the fact that the Big Tree Treaty was a full and complete treaty, a solemn obligation entered into in good faith by the United States as a contracting party, with all the force of an act of Congress, and was expressly ratified by the Senate and proclaimed by the President.

This is *a propos* to appellant's contention that the judgment of the Supreme Court of Washington should be reversed because it constitutes a violation of Art. VI, clause 2, of the Constitution, which makes a treaty "the supreme law of the land", and that the right to regulate Indian fishing is wholly within the scope of Federal authority.

There is nothing new and novel in this contention. It was strenuously urged by both the Plaintiff in Error and the government in the *Kennedy* case that the Big Tree Treaty as the "supreme law of the land" had never been abrogated, modified or repealed, and that thereby the United States had declared, and did still declare that the Seneca Indians had a free right of fishing and hunting on ceded lands, with such limitations only as the treaty itself reasonably implies, and that a state law which limits the right as to time, means and methods so as to make it practically valueless for purposes of continuous subsistence, are in direct conflict with the treaty.

The government urged that such laws, with their criminal sanctions, "interfere forcibly with the regulations established by the United States and the Indians, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the Union" (citing *Worcester* v. *Georgia*, 6 Pet. 515).

In the *Kennedy* case, the government further forcefully contended that state police powers must yield when clearly in conflict with the prohibitions of the Constitution or with Federal law or treaties passed or made in the exercise of the powers, and that the hunting and fishing rights in-

volved were part of the original Indian right of occupancy, reserved in the very instrument of cession, never relinquished, and continuously held under the ancient Indian title. The *loqus in quo* (within the state of New York, as the *locus in quo* in this instance, is in the state of Washington) the government argued, was therefore, and has always remained an Indian reservation *pro tanto*.

Thus, we respectfully submit that every major contention by the appellant in the case at bar, and others advanced with equal force, were urged upon this court, and were rejected by it. The *Kennedy* v. *Becker* case stands for the proposition that a reservation in a treaty of common fishing privileges with grantees and their heirs on ceded lands, impresses the land so ceded with a perpetual easement or servitude, and does not restrain the state in any reasonable regulation of the privileges by those entitled to enjoy them.

No other meaning can be gleaned from the language of Mr. Justice Hughes, which, *a fortiori* is all the more unmistakable in its application to the case at Bar since specific reference is made by Mr. Justice Hughes to the Yakima Treaty in announcing this rule

(4) *Coyle* v. *Smith*, 221 U. S. 559, was decided in 1911. This case stands unequivocally for the proposition that "the power given to Congress by Par. 3 of Article 4 of the Constitution to admit new States relates only to such States as are equal to each other "in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Skiriotes* v. *Florida*, 313 U. S. 69. In the *Coyle* case, this court reaffirmed the application of this rule to the inheritance of absolute power over wild life by a state on admission into the Union, even when asserted and maintained against the claim that the police power over its fish and game had been restricted by an Indian Treaty, citing *Ward* v. *Race Horse* with approval.

INDIAN CITIZENSHIP DOES NOT DIVEST THE STATE OF ITS POLICE POWER.

Appellant contends that the grant of citizenship to the Indians does not dissolve their tribal relationship *ipso facto* and hence that the investiture of the Indians with citizenship rights does not divest them of their treaty rights. But these rights are not absolute without regard to the change of conditions that have taken place since their conception. The argument is met in substance by Mr. Justice Black in the case of *Jackson County* v. *U. S.*, 308 U. S. 343, 354:

> "Congress has traditionally treated the Indian wards of the Nation with particular solicitude, but has also gradually evolved a policy looking to their eventual absorption into the general body of citizenry. This policy has progressively subjected Indians to the laws under which all other citizens must live in the Indians' State of residence, if not in conflict with specific protective measures of Congress."

When Indians became full fledged citizens in 1924, they became entitled to all the immunities and benefits of citizenship and also became subject to the laws of the state enacted for the protection of the citizenry, including traffic laws, health laws, pure food and drug laws, in fact, all laws enacted by the state within the contemplation of its police powers.

The general purpose of the government is to protect the Indian, not to injure him. The government, as in the *Winans* case, wanted to insure equal fishing privileges for the Indians. Fish regulations are not the kind of regulations which tend toward deprivation of his rights, but that kind of regulation which tend toward preservation of the fish, and the attendant preservation of the benefits incident to the fishing privilege which the treaty secured the Indian against discrimination. In proportion as fish laws protect and preserve the game, are they beneficial to the Indian as well as to others who enjoy the fishing privileges. The right to fish of the character granted in the treaty, like

any other property right or privilege, is subject to reasonable regulation necessary to its security.

FEDERAL TREATY POWER DOES NOT ABRIDGE THE STATE'S POLICE POWER.

Appellant contends that *United States* v. *Winans* is wholly controlling of the issues of the case at bar, and that *Ward* v. *Race Horse, Coyle* v. *Smith* and *Kennedy* v. *Becker* have been superseded by *Missouri* v. *Holland,* 252 U. S. 416; *Askara* v. *Seattle,* 265 U. S. 332; *Nielsen* v. *Johnson;* 279 U. S. 47, and *U. S.* v. *Belmont,* 301 U. S. 324, which appellant contends squarely hold that state statutes enacted pursuant to the police power must yield to exercises of the federal treaty power. (P. 18 Appellant's brief)

An analysis of these opinions reveal that *Askara* v. *Seattle* and *Nielsen* v. *Johnson* merely hold that a city ordinance and a state statute, respectively, may not discriminate against aliens in violation of an express treaty provision to the contrary. These cases are in no manner in point.

The same is true of *U. S.* v. *Belmont,* which in no respect involved the police power of the states. The only question involved was whether or not the state court could refuse to give effect to a confiscatory act of the Soviet Government, the right under which had passed to the United States under the treaty in question.

The strongest case in support of the government's contention is *Missouri* v. *Holland, supra. Ward* v. *Race Horse, Coyle* v. *Smith* and *Kennedy* v. *Becker* are not so much as mentioned. Had it been the intention of this court to overrule or diminish the effect of those decisions, at least some reference would have been made to these earlier cases.

More significant, the basis of the decision in *Missouri* v. *Holland* is clearly indicated in the concluding paragraph of the opinion by Mr. Justice Holmes, which reads:

> "Here a *national* interest of very nearly the first magnitude is involved. It can be protected *only* by national

action in concert with that of another power. The subject matter is only transitorily within the state and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and of our crops are destroyed. It is not sufficient to rely upon the states. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of the opinion that the treaty and statute must be upheld. Carey v. South Dakota, 250 U. S. 110." (Italics supplied)

In the case at bar, we are confronted with exactly the opposite situation. That a local, rather than a national interest is involved is admitted by appellant (Appellant's Brief, p. 25) and the reasons which called for the supremacy of the federal statutes in the *Missouri* v. *Holland case,* call for supremacy of the state regulatory statutes in the instant case. In the *Missouri* case, the court declared that to hold the state statutes valid would be to prevent effective bird conservation. In the case at bar, effective fish conservation for the Indian citizen and the white citizen depends upon the power of the state to reasonably regulate.

The subject matter in the instant case is not transitorily within the state, but on the contrary, has a permanent habitat therein, in that the fish migrate to and from the ocean, return to the haunts of their nativity in the headwaters and tributaries of the state to spawn and reproduce under the protecting hand of the state. The state alone has jurisdiction to regulate their taking, with a view to scientific security of future supply. The federal government is powerless to invade the state's domain, and preempt the field of regulation in state waters, which is a valid exercise of police power residing exclusively in the state and which cannot be surrendered to the federal government.

The state of Washington has announced its conservation policy toward its wild life.

Remington's Revised Statutes of Washington, Sec. 10866 declares: "The food fish in the waters of the State of Washington shall be preserved, protected and perpetuated and to that end such food fish shall not be taken at such times or places, by such means or in such manner as will impair the supply thereof." (Laws of 1921)

Remington's Revised Statutes of Washington, Sec. 5863 declares:

"The game animals, furbearing animals, game birds and non-game birds in the State of Washington, and the game fish in the waters of the State of Washington shall be preserved, protected and perpetuated and to that end such game animals, furbearing animals, game birds, non-game birds and game fish shall not be hunted, trapped or fished for at such times and places and by such means or in such manner as will impair the supply thereof." (Laws of 1925, Ex. Session)

Nothing in the treaty purports to cut down the state's right to protect through reasonable and appropriate regulation the fast diminishing fisheries. It is not incumbent upon a state to sit idly by and permit a particular group of its citizens to fish in defiance of state law, while another must conform thereto, when the very object of the conservation measure is to protect and insure the future supply for the enjoyment of each.

CONCLUSION.

We respectfully contend that the foregoing considerations conclusively demonstrate that as a matter of law the Stevens Treaty of 1855 vouchsafed to the confederated Yakima Tribe perpetual easement rights of ingress to and egress from their usual and accustomed fishing grounds, there *to fish in common with the citizens of the territory*; that the Enabling Act admitted Washington into the Union invested with all the powers inherent to a sovereign state, including the right to regulate its internal affairs for the welfare of its citizens; that, accordingly, the fishing rights

granted by the treaty is subject to the paramount and superior right of the state under the exercise of its sovereign police power to regulate the taking of fish from the waters within its jurisdiction; that Congress in 1924 granted the Indian full citizenship, and the Indian citizen can now fish in common and on a parity with citizens of this commonwealth; and that therefore the judgment of the Supreme Court of the State of Washington should be affirmed.

Respectfully submitted,

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State of Washington,
Counsel for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 318

SAMPSON TULEE, Appellant,

v.

STATE OF WASHINGTON, Appellee.

MOTION OF STATE OF OREGON FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE

I. H. VAN WINKLE,
Attorney-General of the State of Oregon,

REX KIMMELL,
Assistant Attorney-General of the State of Oregon,

Counsel for State of Oregon as Amicus Curiae.

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MOTION OF STATE OF OREGON FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

May it Please the Court:

The undersigned, as counsel for State of Oregon, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

I. H. VAN WINKLE,
Attorney-General of the
State of Oregon,

Counsel for State of Oregon
as Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 318

SAMPSON TULEE, Appellant,

v.

STATE OF WASHINGTON, Appellee.

BRIEF OF STATE OF OREGON, AS AMICUS CURIAE

I. INTEREST OF THE STATE OF OREGON

The appellant contends that members of the Yakima tribe of Indians have a present right to take fish outside the boundaries of their reservation at all "usual and accustomed places", and that the exercise of such right is not subject to regulation by state law. The right is claimed by virtue of paragraph 2 of Article III of the Yakima Treaty of June 9, 1855, which provides in part as follows:

> "The exclusive right of taking in all the streams where running through or bordering said reservation, is further secured to said confederates tribes and bands of Indians, as also the right of taking

fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them * * *."

Admittedly, some of the places on the Columbia river where the Yakima tribe of Indians were accustomed to and usually took fish at the time such treaty was executed were outside of the reservation, on the south bank of said river, and within the present jurisdiction of the State of Oregon.

The State of Oregon concedes the right reserved in such treaty but, like the State of Washington, insists that such right is subject to the police power of the state to regulate the manner in which the same shall be exercised by the Indians.

The State of Oregon, having an interest in the principles of law involved in the present case common to that of the appellee, respectfully submits this brief amicus curiae.

THE ISSUE

The ultimate issue to be determined in this cause can be stated as follows:

Can the state, by legislation duly enacted in the exercise of its police power, regulate the taking of fish by members of the Yakima Indian tribe at the usual and accustomed places outside the reservation and within the jurisdiction of the state?

The State of Oregon contends, as does the State of Washington, that within its jurisdiction no person or class of persons is immune from the operation of its

laws duly enacted pursuant to its police power. In this case the appellant claims immunity from the operation of the laws of the State of Washington regulating the taking of salmon and other food fish, by virtue of the treaty provision above quoted.

II. ARGUMENT

The appellee has filed a brief in which the decisions of this and other courts pertinent to the issue presented are exhaustively cited and reviewed, and because of the similar position of the two states, and in order to avoid repetition, Oregon respectfully asks leave to incorporate the arguments therein made into this brief by reference; and to urge such arguments in support of its theory of the law involved controlling the determination of the issue here presented.

Certain points, we believe, however, should be emphasized and they will be hereinafter discussed.

THERE IS NO CONFLICT BETWEEN THE STATE LAW OF WASHINGTON AND THE YAKIMA TREATY OF JUNE 9, 1855.

The treaty constitutes a grant of certain land by the Indian tribe to the United States government, impressed with an easement which forever guarantees to the members of the tribe the right of ingress to and egress from their "usual and accustomed places" of fishing, and the further right to erect temporary buildings thereon to cure the fish taken.

The treaty reserves to the Indian tribe certain land for their own exclusive occupancy and, although the

exclusive privilege of fishing thereon is retained, the members of the tribe are not restricted thereto but may otherwise fish when and as before, not exclusively, however, but only "in common with the citizens" of the state.

Other citizens by acquiring private title to lands adjoining the "usual and accustomed places" may exclude every one therefrom except members of the Yakima tribe of Indians; they cannot be excluded because of the pertinent reservation in the treaty.

This court interpreted the treaty as hereinabove set forth in the case of *United States v. Winans*, 198 U. S. 371, 49 L. ed. 1089, wherein it is stated, on page 381 of U. S. Reports, as follows:

> "* * * Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places,' and the right 'of erecting temporary buildings for curing them.' The

contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,—the right of crossing it to the river,—the right to occupy it to the extent and for the purpose mentioned. * * *"

It is pertinent to note that the opinion in the above entitled case interprets the treaty liberally and we apprehend that it will be urged by the appellant as a binding judicial precedent, requiring every doubtful meaning in the language of the treaty to be resolved in his favor. Such fact emphasizes and lends force to the following statement appearing in the opinion on page 384:

"The extinguishment of the Indian title, opening the land for settlement, and preparing the way for future states, were appropriate to the objects for which the United States held the territory. And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.' *Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.*" (Italics ours.)

This court there held that the treaty did not conflict with or restrain the future state from the exercise of its police power at the Indians' "usual and accustomed places" of fishing in regulating fishing there.

The Supreme Court of the State of Michigan, in the case of *People vs. Chosa*, 252 Mich. 154, had before

it a question substantially the same as that here involved. After citing, with approval, the cases of *Ward v. Race Horse*, 163 U. S. 504, *United States v. Winans*, supra, and *Kennedy v. Becker*, 241 U. S. 556, the court states, on page 160:

> "These cases are conclusive on the effect of the treaties at bar. The treaties evidently established a servitude of the right to hunt and fish on the ceded land in favor of the Indians and against the exclusive dominion of private ownership, but they provided no immunity from operation of game laws, as against the State.
>
> "* * * It must, therefore, be held that defendants are subject to the game laws of the State, on the lands covered by the treaties, to the same extent as the general public."

In the opinion last above cited the court also considered the effect on this question of the Act of Congress of February 8, 1887, 24 U. S. Stat. p. 390, section 6 (8 USCA, section 3; 25 USCA, section 349), which is as follows:

> "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have

been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life (and every Indian in Indian Territory), is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

In that regard the court states, on page 162:

"* * * Assuming, but not deciding, that the statutory exception, that their right to tribal or other property is not impaired by taking on American citizenship, applies to the treaty right to hunt and fish on the ceded land, it would only preserve that right as a private servitude or *profit a prendre*, and would confer no greater privilege of violating State laws than the owner of the land would have."

The well-reasoned opinions in the above cases, as well as those in the numerous other cases to the same effect cited in appellee's brief, quite clearly establish the principle that the treaty recognizes the right of the future state, in the exercise of its sovereign police power, to regulate fishing by the Indians within its jurisdiction in the same manner that it may regulate

fishing by other citizens. Such is the purpose and effect of the state law which the appellant in this instance has violated.

MEANING OF THE PHRASE "IN COMMON WITH CITIZENS OF THE TERRITORY"

It is interesting to note that in paragraph I, Article III, of the same treaty, another reservation of a right is made in the following language:

> "as also the right, in common with citizens of the United States, to travel upon all public highways."

In so far as this writer has been able to ascertain, no Yakima Indian has ever claimed immunity from the operation of state traffic laws enacted under the state police power to regulate the use of the public highways. The reason obviously is that the Indians consider that the phrase "in common with citizens of the United States" means subject to the same regulatory laws as other citizens.

We submit that if, by reason of the reservation in the treaty, the Yakima Indians are not subject to the regulatory laws governing fishing in the state of Washington they are not, for the same reason, subject to the regulatory laws governing the use of the public highways therein.

IF THE STATE LAW AND THE TREATY CAN NOT STAND TOGETHER WITHOUT CONFLICT THE STATE LAW MUST PREVAIL, FOR THE REASON THAT A STATE, UPON ITS ADMISSION INTO THE UNION, BECOMES POSSESSED OF

ALL RIGHTS AND POWERS EQUAL WITH ALL THE OTHER STATES.

Congress can only impose those limitations upon the sovereignty of a new state which it might impose after admission under the powers granted to it by the Federal constitution. No other limitation is enforceable.

In the case of *Coyle v. Smith*, 211 U. S. 559, 55 L. ed. 853; this court established the rule above stated, and in doing so used the following language, page 573:

> "The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission."

The effect of the opinion last above quoted from and that in the case of *Ward v. Race Horse*, 163 U. S. 504, is to establish the principle of law that that portion of an Indian treaty entered into by the government prior to the admission of a state into the Union, which restricts or limits the police power of the future state, is repealed or becomes ineffective by the act of admitting the state into the Union.

The case of *Escanaba Company v. Chicago*, 107 U. S. 678, establishes the rule of law applicable in this

case in the following clear language found on page 688 of the Reporter:

> "Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. * * * Equality of constitutional right and power is the condition of all the States of the Union, old and new."

The State of Washington was admitted to the Union subsequent to the Yakima treaty, fully possessed of all rights of dominion and sovereignty. Even though, as heretofore pointed out, the treaty constituted a servitude upon the land adjoining the usual and accustomed fishing places of the Indians, it did not place any servitude or limitation upon the state's sovereign police power.

CONCLUSION

The State of Oregon has an interest in the propagation and conservation of fish in the Columbia river in common with that of the State of Washington. In furtherance of that interest Oregon has enacted laws governing the taking of salmon and other food fish therefrom. (Title 83, Chap. 5, Article I, Oregon Com-

piled Laws Annotated.) Within the jurisdiction of the State of Oregon are "usual and accustomed places" of fishing of Yakima Indians, where they may exercise their treaty rights to take fish "in common with the citizens" of the state. At those places neither the Indians nor the white citizens may exclude the other from taking fish. The adjacent land is subject to the easement of the Yakima Indians for the purposes mentioned in the treaty.

The states were admitted into the Union with full and unimpaired sovereign police power to regulate their internal affairs. There is no language in the Yakima Indian treaty which reserves to the Indians immunity from the operation of those powers to regulate fishing within the respective jurisdictions or otherwise.

This case should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 318.—October Term, 1941.

Sampson Tulee, Appellant, vs. State of Washington. } On Appeal from the Supreme Court of the State of Washington.

[March 30, 1942.]

Mr. Justice Black delivered the opinion of the Court.

The appellant, Sampson Tulee, a member of the Yakima tribe of Indians, was convicted in the Superior Court for Klickitat County, Washington, on a charge of catching salmon with a net without first having obtained a license as required by state law.[1] The Supreme Court of Washington affirmed. 7 Wn. 2d 124. The case is here on appeal under Section 237(a) of the Judicial Code, 28 U. S. C. 344(a), the appellant challenging the validity of the Washington statute as applied to him on the ground that it was repugnant to a treaty made between the United States and the Yakima Indians.

In 1855, the Yakimas and other Indians owned and occupied certain lands in the Territory of Washington, which the United States wished to open up for settlers. May 29, 1855, representatives of the government met in council with representatives of the Indians, and after extended discussions lasting until June 11, the Indians agreed to a treaty, under which they were to cede 16,920 square miles of their territory, reserving 1,233 square miles for the confederated tribes represented at the meeting. As consideration for the cession by the Indians, a cession which furthered the national program of transforming wilderness into populous, productive territory, the government agreed to pay $200,000; to build certain schools, shops, and mills and keep them equipped for twenty years; to erect and equip a hospital; and to provide teachers and various helpers for twenty years. This agreement was ratified and proclaimed as a treaty in 1859. 12 Stat. 951.

[1] "It shall be unlawful to catch, take or fish for food fish with any appliance or by any means whatsoever except with hook and line . . . unless license so to do has been first obtained. . . ." Remington's Revised Statutes of Washington, Section 5693. "For each dip bag net license for the taking of salmon on the Columbia River, [the license fee shall be] five dollars. . . ." *Id.* (vol. 7, 1940 supp.), Section 5703.

The appellant claims that the Washington statute compelling him to obtain a license in order to fish for salmon violates the following provision of Article III of the treaty:

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

The state does not claim power to regulate fishing by the Indians in their own reservation. *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655. Nor does it deny that treaty rights of Indians, whatever their scope, were preserved by Congress in the act which created the Washington Territory and the enabling act which admitted Washington as a state. 10 Stat. 172; 25 Stat. 676. Relying upon its broad powers to conserve game and fish within its borders,[2] however, the state asserts that its right to regulate fishing may be exercised at places like the scene of the alleged offense which, although within the territory originally ceded by the Yakimas, is outside of their reservation. It argues that the treaty should not be construed as an impairment of this right and that since its license laws do not discriminate against the Indians, they do not conflict with the treaty. The appellant, on the other hand, claims that the treaty gives him an unrestricted right to fish in the "usual and accustomed places", free from state regulation of any kind. We think the state's construction of the treaty is too narrow and the appellant's too broad; that while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish,[3] it forecloses the state from charging the Indians a fee of the kind in question here.

In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States* v. *Winans*, 198 U. S. 371, this Court held that, despite the phrase "in common with citizens of the

[2] Geer v. Connecticut, 161 U. S. 519; Ward v. Race Horse, 163 U. S. 504, 507; Patsone v. Pennsylvania, 232 U. S. 138; Lacoste v. Dept. of Conservation, 263 U. S. 545, 549.

[3] Cf. Kennedy v. Becker, 241 U. S. 556. See United States v. Winans, *supra*, 384.

territory". Article III conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their "usual and accustomed places" in the ceded area; and in *Seufert Bros. Co.* v. *United States*, 249 U. S. 194, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. *United States* v. *Kagama*, 118 U. S. 375, 384; *Seufert Bros. Co.* v. *United States, supra*, 198-199.

Viewing the treaty in this light we are of the opinion that the state is without power to charge the Yakimas a fee for fishing. A stated purpose of the licensing act was to provide for "the support of the state government and its existing public institutions." Laws of Washington (1937) 529, 534. The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not indispensable to the effectiveness of a state conservation program. Even though this method may be both convenient and, in its general impact fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the "usual and accustomed places" cannot be reconciled with a fair construction of the treaty. We therefore hold the state statute invalid as applied in this case.

The judgment of the Supreme Court of Washington is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.